

***United States Court of Appeals
for the Second Circuit***



APPENDIX

No. 76-4228

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

W. J. USERY, JR., SECRETARY OF LABOR,
Petitioner,

v.

NORTHEAST MARINE TERMINAL COMPANY
and
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

ON PETITION TO REVIEW AN ORDER OF THE
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

JOINT APPENDIX

ALFRED J. ALBERT
Acting Solicitor of Labor

BENJAMIN W. MINTZ
Associate Solicitor for
Occupational Safety and Health

MICHAEL H. LEVIN
Counsel for Appellate Litigation

ALLEN H. FELDMAN
Assistant Counsel for
Appellate Litigation

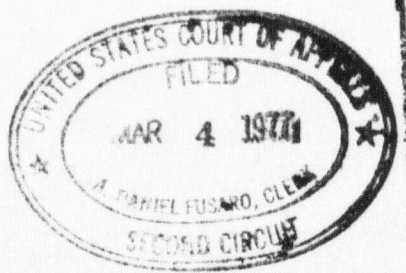
JOHN A. BRYSON
Attorney

Attorneys for Petitioner

WILLIAM M. KIMBALL, Esq.
Burlingham, Underwood and
Lord
New York, New York

ALLEN H. SACHSEL, Esq.
Department of Justice
Washington, D.C.

Attorneys for Respondents



PAGINATION AS IN ORIGINAL COPY

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1

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

W. J. USERY, JR., SECRETARY OF LABOR,)

Petitioner,)

v.)

NORTHEAST MARINE TERMINAL COMPANY
and OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION,)

No. 76-4228

Respondents.)

CERTIFIED LIST OF THE OCCUPATIONAL SAFETY
AND HEALTH REVIEW COMMISSION

The Occupational Safety and Health Review Commission, by its Executive Secretary, certifies that the list set forth below constitutes a full and accurate transcript of the entire record of a proceeding had before said Commission and known upon its records as OSAHRC Docket No. 8221. This transcript includes the pleadings, testimony and evidence upon which the order of the Commission in said proceeding was entered, and includes also the findings and order of the Commission.

VOLUME I Exhibits introduced into evidence:

Secretary's (Complainant's) Exhibit No. 1

<u>VOLUME II</u>	Stenographic transcript of testimony taken before Administrative Law Judge Joseph Chodes on September 13, 1974 -----	<u>CERTIFIED RECORD</u> 1-116
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VOLUME III Pleadings --

1. Copy of Secretary's Citations, dated May 14, 1974 -----		1-2
2. Copy of Secretary's Notification of Proposed Penalty, dated May 14, 1974 -----		1
3. Copy of Employer's Notice of Contest, dated May 28, 1974 -----		1
4. Copy of Secretary's Complaint, dated June 12, 1974 -----		1-8
5. Copy of Employer's Answer, dated June 26, 1974 -----		1-4
6. Copy of Commission's Notice of date, time and location of Hearing, dated July 15, 1974 -----		1
7. Copy of Employer's Post-Hearing Brief, dated November 1, 1974 ---		1-3
8. Copy of Secretary's Memorandum, dated November 27, 1974 -----		1-11

- 2 -

- | | |
|---|------|
| 9. Copy of Administrative Law Judge's Decision and Order, dated January 30, 1975 ----- | 1-10 |
| 10. Copy of Secretary's Petition for Discretionary Review, dated January 29, 1975 ----- | 1-5 |
| 11. Copy of Commissioner Cleary's Direction for Review, dated February 10, 1975 ----- | 1 |
| 12. Copy of Employer's Brief, dated March 10, 1975 ----- | 1-6 |
| 13. Copy of Secretary's Brief, dated April 14, 1975 ----- | 1-9 |
| 14. Copy of Employer's Reply Brief, dated May 7, 1975 ----- | 1-3 |
| 15. Copy of Commission's Decision, dated August 31, 1976 ----- | 1-10 |

IN TESTIMONY WHEREOF, the Executive Secretary of the Occupational Safety and Health Review Commission, being duly authorized by the Occupational Safety and Health Review Commission, has hereunto set his hand and affixed the seal of the Occupational Safety and Health Review Commission in the City of Washington, District of Columbia, this 18th day of November 1976.

William S. McLaughlin
 William S. McLaughlin
 Executive Secretary
 Occupational Safety and Health
 Review Commission

(SEAL)

COURT NO. 76-4228

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the matter of
NORTHEAST MARINE TERMINAL COMPANY
OSAHRC Docket No. 8221

5/14/74	Secretary's Citations, dated
5/14/74	Secretary's Notification of Proposed Penalty, dated
5/28/74	Employer's Notice of Contest, dated
6/12/74	Secretary's Complaint, dated
6/26/74	Employer's Answer, dated
7/15/74	Commission's Notice of date, time and location of Hearing, dated
9/13/74	Hearing Opened
9/13/74	Hearing Closed
11/1/74	Employer's Post Hearing Brief, dated
11/27/74	Secretary's Memorandum, dated
1/29/75	Secretary's Petition for Discretionary Review, dated
1/30/75	Administrative Law Judge's Decision and Order, dated
2/10/75	Commissioner Cleary's Direction for Review, dated
3/10/75	Employer's Brief, dated
4/14/75	Secretary's Brief, dated
5/7/75	Employer's Reply Brief, dated
8/31/76	Commission's Decision, dated

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

W. J. USERY, JR., SECRETARY OF LABOR,
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v.

NORTHEAST MARINE TERMINAL COMPANY
and OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION,

Respondents.)

No. 76-4228

SUPPLEMENT TO CERTIFIED LIST

Omitted from the certified list filed with the Court on November 18,
1976 were the following documents:

Copy of Administrative Law Judge's Instructions to Participants,
dated July 22, 1974 ----- 1-4

Copy of Employer's correspondence re Administrative Law Judge's
Instructions to Participants, dated August 5, 1974 ----- 1-3

William S. McLaughlin
William S. McLaughlin
Executive Secretary

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February 1977, copies of the
above supplement to certified list were served by mail upon the following:

Michael H. Levin, Esquire
Counsel for Appellate Litigation
U. S. Department of Labor
200 Constitution Avenue, N. W.
Washington, D. C. 202

William M. Kimball, Esquire
Burlingham, Underwood and Lord
25 Broadway
New York, New York 10004

Francis V. LaRuffa, Esquire
Regional Solicitor, USDOL
1515 Broadway, Rm. 3555
New York, New York 10036

William S. McLaughlin
William S. McLaughlin
Executive Secretary
Occupational Safety and Health
Review Commission

BEST COPY AVAILABLE

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

CSHO NO. D-1856	OSHA-1 NO. 127	FY 74
AREA 4170	REGION 2	

CITATION

90 CHURCH STREET
NEW YORK, N.Y. 10007
ROOM 1405

TO: 2. NORTHEAST TERMINAL INCORPORATED
FOOT OF 39th STREET
BROOKLYN, NEW YORK 11232

ATTENTION: MR. D. VIOLA, VICE PRESIDENT

3. Citation Number 1

4. Page 1 of 5. 1

6. TYPE OF ALLEGED VIOLATION(S): NON-SERIOUS (REPEAT)

7. An inspection was made on APRIL 3, & 4, 19 74 of a place of employment located at:

8. FOOT OF 39th STREET and described as follows:

9. STEVEDORE & TERMINAL OPERATOR.

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 *et seq.*, in the following respects:

10. Item number	11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
1	29 CFR 1910.178 (M) (3)	#19 Hi-Lo on 39th. STREET shed area was operating with an unauthorized rider who was exposed to serious injury. One half his body overhung the machine.	IMMEDIATELY UPON RECEIPT OF THIS CITATION

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days*, whichever period is longer.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days* of the issuance of this citation.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) (1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 660(c)(1).

*Under the Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

14. Area Director's Signature _____ Issuance Date MAY 14, 19 74

(NOTICE: Additional Important Information On Reverse Side)

Form OSHA-2

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

90 CHURCH STREET
NEW YORK, N.Y. 10007
ROOM 1405

CITATION

CSHO NO.	OSHA-1 NO.	FY
D-1856	127	74
AREA	REGION	
4170	2	

TO: 2. NORTHEAST TERMINAL INCORPORATED
FOOT OF 39th. STREET
BROOKLYN, NEW YORK 11232

ATTENTION: MR. D. VIOLA, VICE PRESIDENT

3. Citation Number 1

4. Page 1 of 5. 1

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9. STEVEDORE & TERMINAL OPERATOR.

On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651 et seq., in the following respects:

10. Item number	11. Standard, regulation or section of the Act allegedly violated	12. Description of alleged violation	13. Date by which alleged violation must be corrected
1	29 CFR 1910.27 (f)	All ladders shall be maintained in a safe condition all ladders shall be inspected regularly with the intervals between inspections being determined by use & exposure. Caged ladder N. Side of shed 39th. Street for access to shed roof, had lower 10" of rungs bent & broken and upper cage area bent & broken laterally. North side inside shed door 18 West was displaced from mounting and moved freely laterally.	MAY 24, 1974
2	29 CFR 1910.22 (a) (1)	Rear of garage machine storage area and parts shelf area was littered with unused parts, rags and discarded equipment. Machine repair area bench and under bench area accumulated parts and debris. Rear of maintenance building 111A accumulated discarded equipment cardboard, paper, wire and old hose.	IMMEDIATELY UPON RECEIPT OF THIS CITATION
3	29 CFR 1910.213 (h) (1)	Building 39th. Street shed room 111A a radial arm saw not provided with lower blade guard.	MAY 24, 1974
4	29 CFR 1910.25 (e)	In new Hi-Lo repair shop man was using a short ladder from a platform to 10" block house. The ladder rails did not reach the level or clear by 36" above.	IMMEDIATELY UPON RECEIPT OF THIS CITATION
5	29 CFR 1918.25 (f)	A short ladder used in new machine garage was used from platform to 10" block house and not secured or blocked against shifting.	IMMEDIATELY UPON RECEIPT OF THIS CITATION
6	29 CFR 1910.106 (e) (2) (iv) (b)	In garage machine repair area two buckets of flammable liquid were left standing after parts were cleaned. "No Smoking" signs are not posted.	IMMEDIATELY UPON RECEIPT OF THIS CITATION

The law requires that a copy of this citation shall be prominently posted in a conspicuous place at or near each place that an alleged violation referred to in the citation occurred. The citation must remain posted until all alleged violations cited therein are corrected, or for 3 working days*, whichever period is longer.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by submitting a letter to the U.S. Department of Labor at the address shown above within 15 working days* of the issuance of this citation.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11(c) (1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, 660(c)(1).

*Under the Occupational Safety and Health Act, the term "Working Day" means Mondays through Fridays but does not include Saturdays, Sundays, or Federal Holidays.

14. Area Director's Signature _____ Issuance Date MAY 14, 19 74

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

1. **90 CHURCH STREET
NEW YORK, N.Y. 10007
ROOM 1405**

CSHO NO.	OSHA-1 NO.	FY
D-1856	127	74
AREA	REGION	
4170	2	

TO: **NORTHEAST TERMINAL INCORPORATED**
2. **FOOT OF 39th. STREET**
BROOKLYN, NEW YORK 11232

ATTENTION: MR. D. VIOLA, VICE PRESIDENT

3. MAY 14, 1974
Date
THERE IS NO REQUIREMENT THAT
THIS NOTIFICATION BE POSTED.

NOTIFICATION OF PROPOSED PENALTY

This notification and the penalty (ies) proposed by the Secretary of Labor shall be deemed to be the final order of the Occupational Safety and Health Review Commission (an independent agency with authority to issue decisions respecting citations and proposed penalties) and not subject to review by any court or agency unless, within 15 working days from the date of receipt of this notification, you submit a letter of contest. The letter of contest should be mailed or otherwise delivered to the Area Director named below at the address shown at the top of this notification. If no notice of contest is filed within the 15 working day period the proposed penalty (ies) becomes final and is immediately payable.

Payment of all penalties shown is to be made by check or money order payable to the order of "Occupational Safety and Health-Labor". Payment of penalties should be remitted to the Area Director at the address shown above.

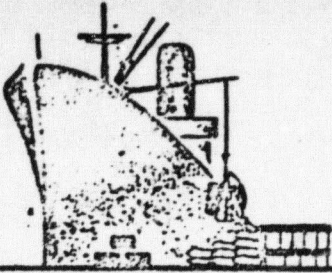
Section 17(1) of the Act states: "Civil penalties owed under this Act shall be paid into the Treasury of the United States and shall accrue to the United States and may be recovered in a civil action in the name of the United States brought in the United States district court for the district where the violation is alleged to have occurred or where the employer has its principal office."

4. On the 14 day of MAY, 1974, a citation(s) was issued to you in accordance with the provisions of Section 9(a) of the Occupational Safety and Health Act of 1970 (84 Stat. 1601; 29 U.S.C. 651, et seq.) hereinafter referred to as the Act. You were thus notified of certain alleged violations of the Act, as specified in that citation(s).

YOU ARE HEREBY NOTIFIED that pursuant to the provisions of Section 10(a) of the Act, the penalty(ies) set forth below is/ are being proposed, based on the citation(s).

5. VIOLATIONS			6. NON-SERIOUS VIOLATIONS		
5A. Citation No.	5B. Item No.	5C. Proposed Penalty	6A. Citation No.	6B. Item No.	6C. Proposed Penalty
			1	1	\$50.00
				2	65.00
				3	65.00
				4	90.00
				5	50.00
				6	100.00
			NON-SERIOUS (REPEAT)		
			1	1	\$200.00
			7. Total Proposed Penalty for All Alleged Violations \$ <u>620.00</u>		
			8. Area Director Date <u>MAY 14, 19 74</u>		

The proposed penalty for Nonserious Violations of safety and health standards reflects a 50 percent adjustment factor for corrective action to be taken within the period prescribed in the citation. If a particular alleged violation is not corrected within this period, the 50 percent adjustment will be added to such other penalty as may subsequently be proposed for failure to correct a violation within the abatement period. No abatement credit is allowed for violations of recordkeeping or posting requirements.



Northeast Marine Terminal Company, Inc.

Foot of 39th Street, Brooklyn, N. Y. 11232 - 499-3900

May 28, 1974

United States Department of Labor
Occupational Safety and Health Administration
Office of the Area Director, New York
90 Church Street
New York, New York 10007

NOTICE OF CONTEST

Sirs:

Northeast Marine Terminal Co., Inc. (mailing, service, and posting address: Foot of 39th Street, Brooklyn, N. Y. 11232) contests Citation CSHO No. D-1856, OSHA-1 No. 127, FY 74, Area 4170, Region 02, issuance dated May 14, 1974, and Notification of Proposed \$620 Penalty simultaneously numbered and dated, concerning alleged non-serious violations at 39th Street Terminal, Brooklyn, N. Y. on April 3 & 4, 1974, which Citation and Notification of Proposed Penalty were received by Employer on or about May 16, 1974.

Very truly yours,

NORTHEAST MARINE TERMINAL CO., INC.

By R. W. Neitz
R. W. Neitz
President

RWN:sm

Copy this date sent by mail to Authorized Employee Representative:

International Longshoremen's Association
Local 1814
343 Court Street
Brooklyn, New York 11231

1974 MAY 29 11 11 AM

UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY & HEALTH REVIEW COMMISSION

PETER J. BRENNAN, SECRETARY OF LABOR :
UNITED STATES DEPARTMENT OF LABOR,

v. :

OSHRC DOCKET

NORTHEAST MARINE TERMINAL COMPANY, INC. : NO. 8221

Respondent, :

INTERNATIONAL LONGSHOREMEN'S :
ASSOCIATION, LOCAL 1814 :

Authorized :
Employee :
Representative :

COMPLAINT

Inspection has disclosed that, at the times and in the manner hereinafter stated, the provisions of the Occupational Safety and Health Act of 1970 (84 Stat. 1590, 29 U.S.C. 651, et seq.), hereinafter referred to as the Act, and the Occupational Safety and Health Standards promulgated thereunder (29 C.F.R. Parts 1910 and 1918) have been violated. It is, therefore, averred and charged that:

I

Jurisdiction of this action is conferred upon the Occupational Safety and Health Review Commission by section 10(c) of the Act.

II

The respondent, Northeast Marine Terminal Company, Inc. a corporation organized under the laws of the State of New York and doing business in the State of New York maintaining an

office and place of business at Foot of 39th Street, Brooklyn, New York is and at all times hereinafter mentioned was engaged as a marine terminal operator involving stevedoring and warehousing operations.

III

Many of the materials and supplies used by respondent corporation were manufactured outside the State of New York and the respondent corporation was and is engaged in a business affecting commerce within the meaning of sections 3(3) and 3(5) of the Act.

IV

As a result of an inspection by an authorized representative of the complainant, respondent corporation was issued two citations for violations on May 14, 1974 pursuant to section 9(a) of the Act.

V

On April 3 and 4, 1974 at respondent's place of employment, a marine terminal located at the Foot of 39th Street, Brooklyn, New York, the respondent violated the following standards promulgated pursuant to section 6 of the Act in the following manners:

1. 29 C.F.R. 1910.27(f) in that respondent failed to maintain all ladders in a safe condition and inspect all ladders regularly with the intervals between inspections being determined by use and exposure. The caged ladder on the north side of shed on 37th Street for access to shed roof had lower 10 feet of rungs bent and broken and upper cage

area bent and broken laterally, at the west side inside shed door 18 an 18 foot ladder leading to an overhead platform was broken from its mounting and moved freely laterally.

2. 29 C.F.R. 1910.22(a)(1) in that respondent failed to keep all places of employment clean and orderly and in a sanitary condition in that the rear of the garage machine storage area and parts shelf area were littered with unused parts, rags and discarded equipment. Other areas littered with debris included the machine repair area bench, and the rear of maintenance building 111A.

3. 29 C.F.R. 1910.213(b)(1) in that respondent failed to equip a radial arm saw with a lower blade guard in building 111A storeroom.

4. 29 C.F.R. 1918.25(e) in that respondent permitted the use of a portable straight ladder which failed to extend at least 36 inches above the upper landing surface in the garage from a platform to the 10 foot blockhouse.

5. 29 C.F.R. 1918.25(f) in that respondent failed to lash, block or otherwise secure a portable straight ladder in the garage used from a platform to the 10 foot blockhouse to prevent shifting or slipping.

6. 29 C.F.R. 1910.106(e)(2)(iv)(b) in that where flammable or combustible liquids are used or handled means shall be provided to dispose promptly and safely of leakage or spills, in the garage machine repair area where two buckets of flammable liquid were left standing after parts were cleaned.

7. 29 C.F.R. 1910.178(m) (3) in that respondent failed to prevent unauthorized personnel from riding on powered industrial trucks. One half of the employee's body extended beyond the machine frame of Hi-Lo #19 in the 39th Street shed area.

VI

The violations alleged in paragraph V(1),(2),(3),(4),(5),(6), and (7) were violations within the meaning of section 17(c) of the Act and had a direct and immediate relationship to the safety and health of the employees on the work site.

VII

The violation alleged in the citation in paragraph V(7) was a repeated violation within the meaning of section 17(a) of the Act in that respondent, as a result of an inspection conducted on January 25, 1972, was cited on February 4, 1972 for a non-serious violation of 29 C.F.R. 1910.178(m) (3). This citation was not contested and became a final order of the Commission.

VIII

On May 14, 1974 a notification of proposed penalty for the citation was served on the respondent corporation, proposing a penalty of \$620.00. In determining the amount of the proposed penalty, due consideration was given to the size of the business of the respondent corporation, the gravity of the violations, the good faith of the employer and the history of previous violations, as required under section 17(j) of the Act.

IX

On May 28, 1974 the respondent corporation filed with a representative of the Secretary of Labor, a notification of intent to contest the aforesaid citations and the proposed assessment of the penalty pursuant to the provisions of section 10(c) of the Act. This notification of intent to contest was duly transmitted to the Occupational Safety and Health Review Commission and jurisdiction of this proceeding is conferred upon the Commission by section 10(c) of the Act.

X

Several of respondent's employees are affected by the violation reflected in paragraph V herein. The authorized employee representative of the affected employees is the International Longshoremen's Association, Local 1814 an unincorporate association maintaining an office at 343 Court Street, Brooklyn, New York. At all times relevant the said local union was certified as the collective bargaining representative of the affected employees of the respondent corporation and at all times relevant herein it has had collective bargaining agreements with the respondent corporation.

WHEREFORE, the aforesaid citations and proposed penalty should be affirmed.

William J. Kilberg
WILLIAM J. KILBERG
Solicitor of Labor

Francis V. La Ruffa
FRANCIS V. LA RUFFA
Regional Solicitor

Theodore T. Motsch
THEODORE T. GOTSCH
Attorney

U. S. DEPARTMENT OF LABOR
Attorneys for PETER J. BRENNAN
SECRETARY OF LABOR

JUL 13 1932
OFFICE OF THE
EXECUTIVE SECRETARY

Notice to the Northeast Marine Terminal Company, Inc.

You are hereby notified that you must plead or otherwise answer this complaint, either denying or admitting the allegations, within 15 days of your receipt of this complaint. Failure to do so may result in dismissal of your notice of contest. See Rule 33(b), Rules of Procedure, Occupational Safety and Health Review Commission.

CERTIFICATE OF SERVICE

I, JANET NELSON, an employee of the United States Department of Labor in the Office of the Regional Solicitor, 1515 Broadway, New York, New York certify that on the 12th day of June I mailed postpaid by first class mail bearing Government frank three (3) copies of the attached

COMPLAINT

two copies being addressed to Northeast Marine Terminal Company, Inc. and one copy being addressed to International Longshoremen's Association, Local 1814 at the addresses stated after their names:

Northeast Marine Terminal Company, Inc.
Foot of 39th Street
Brooklyn, New York

International Longshoremen's Association
Local 1814
343 Court Street
Brooklyn, New York


JANET NELSON

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

----- X

PETER J. BRENNAN, Secretary of Labor, United States Department of Labor,	:	
	:	
Complainant,	:	OSHRC Docket 1 8221
NORTHEAST MARINE TERMINAL COMPANY, INC.,	:	
	:	
Respondent,	:	
	:	
LOCAL 1814, INTERNATIONAL LONG- SHOREMEN'S ASSOCIATION,	:	
	:	
Authorized Employee Representative.	:	

----- X

ANSWER

Employer respondent Northeast Marine Terminal Company, Inc., by its attorneys Burlingham Underwood & Lord, answering the complaint herein upon information and belief:

1. Admits paragraph I.
2. Without admitting all the verbiage in paragraphs II and III, admits that respondent was and is an employer engaged in a business affecting commerce, as defined in Sections 3(3), 3(5) of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651, et seq.)

3. Admits that on or about April 3 and 4, 1974 an authorized representative of complainant was at 39th Street Terminal, Brooklyn and that on or about May 14, 1974 respondent was issued 2 citations ostensibly pertaining thereto, but denies that said citations were issued pursuant to Section 9(a) of said Act and, except as thus admitted; denies paragraph IV.

4. Denies paragraph V.

5. Denies paragraph VI.

6. Denies paragraph VII.

7. Admits the first sentence of paragraph VIII and, except as thus admitted, denies paragraph VIII.

8. Admits paragraph IX.

9. Admits the allegations concerning I.L.A. Local 1814, but denies any violation or that any employees were affected by any such violation and, except as thus admitted, denies paragraph X.

10. The complaint should be dismissed for complainant's failure to timely notify defendant of the citations and proposed penalties, contrary to Section 9 of the Act, 29 C.F.R. 1903.14, 1903.15, and OSHA Program Directive No. 200-28. [Cf. - April 15, 1974 citations and notification of proposed penalty to Northeast

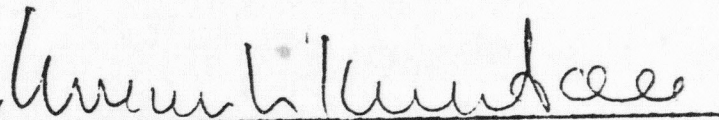
Stevedoring Co., Inc. following April 3, 4, 1974 inspections at 39th Street Terminal, Brooklyn, CSHO No. D-1856, OSHA-1 No. 128, FY74, Area 4170, Region 02]

WHEREFORE, said citations and proposed penalty ostensibly issued to respondent on or about May 14, 1974 should be vacated.

Yours, etc.,

Northeast Marine Terminal Company, Inc.

By BURLINGHAM UNDERWOOD & LORD
Attorneys for Respondent

By 
William M. Kimball
A Member of the Firm
Office and Post Office Address
25 Broadway
New York, N. Y. 10004
(212) 422 - 7585

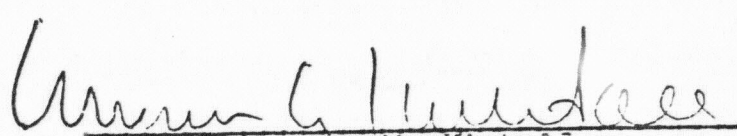
I certify that on June 26, 1974 I caused this answer:

1. To be filed with the Commission by first class mail, addressed to the Executive Secretary, 1825 K Street N.W., Washington, D.C. 20006 pursuant to 29 C.F.R. 2200.8(b).

2. To be served on the Solicitor of Labor by first class mail addressed to Francis V. LaRuffa, Esq., Regional Solicitor, United States Department of Labor, 1515 Broadway, New York, New York 10036, attention Theodore T. Gotsch, Esq., pursuant

to 29 C.F.R. 2200.7(c).

3. To be served on the Authorized Employee Representative by first class mail addressed to Local 1814, International Longshoremen's Association, 343 Court Street, Brooklyn, New York, pursuant to 29 C.F.R. 2200.7(c).


William M. Kimball

21

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

NOTICE OF HEARING

SECRETARY
OF LABOR v. Northeast Marine Terminal Co., Inc.

OSAHRC
DOCKET NO. 8221

A Hearing will be held in the above case beginning at 10:00
on September 13, 1974 at OSHRC Courtroom 3800
1515 Broadway
in New York, New York
State

Pursuant to Section 9(b) of the Occupational Safety and Health Act of 1970 and Section 2200.7(i) and (j) of the Commission's Rules (copy enclosed), each employer is hereby required to serve and/or post this NOTICE OF HEARING in order to afford affected employees or their representatives an opportunity to participate as parties during this proceeding.

Affected employees are entitled to participate in this hearing under terms and conditions established by the Occupational Safety and Health Review Commission in its Rules of Procedure. Notice of intent to participate should be sent to:

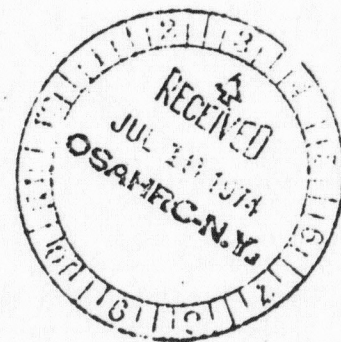
Occupational Safety and Health Review Commission
1825 K Street, N. W.
Washington, D. C. 20006

Dated: July 15, 1974

cc:

William M. Kimball, Esquire
Burlingham, Underwood & Lord
25 Broadway
New York, New York 10004

Francis V. LaRuffa
Regional Solicitor
1515 Broadway, Rm. 3555
New York, New York 10036



CERTIFIED MAIL # _____
RETURN RECEIPT REQUESTED



UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 BROADWAY
Room 3411
NEW YORK, NY 10036

CERTIFIED # (S) 055448-9
RETURN RECEIPT REQUESTED

22

Tel. (212) 971-7985, 7986

IN REFERENCE TO

CASE
NAME Northeast Marine Terminal Company, Inc.

OSAHRC
DOCKET NO. 8221

NOTICE IS HEREBY GIVEN TO THE FOLLOWING:

FOR THE SECRETARY OF LABOR

OF Instructions to Participants

Francis V. LaRuffa, Regional Solicitor
U. S. Department of Labor
1515 Broadway, Room 3555
New York, New York 10036
Att: Theodore T. Gotsch, Esq.

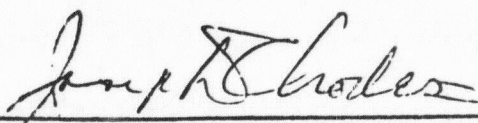
To wit: See attached

FOR EMPLOYERS

William M. Kimball, Esquire
Burlingham, Underwood & Lord
25 Broadway
New York, New York 10004

FOR EMPLOYEES

Dated: July 22, 1974
New York, New York


JOSEPH CHODES
JUDGE, OSAHRC



UNITED STATES OF AMERICA

OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1515 BROADWAY
Room 3400
NEW YORK, NY 10036

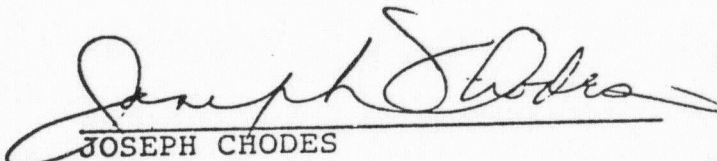
Tel. (212) 971-7985, 7986

INSTRUCTIONS TO PARTICIPANTS

1. Each of the parties to this proceeding is hereby required to exchange with all other parties and submit to the Judge, postmarked no later than August 19, 1974, the following material:
 - a. The name and address of each witness it proposes to produce together with a summary of the testimony expected to be furnished by the witness.
 - b. The names, address and qualifications of each expert witness it proposes to produce. The statement of qualifications shall include the titles and dates of his publications together with a copy of each publication upon which he will rely or to which he may refer during his testimony.
 - c. A complete list of the documents which it proposes to offer in evidence together with a copy of each such document.
 - d. Formulation of the issues to be tried at the hearing.
2. Each party shall be prepared at the commencement of the hearing to stipulate the admission of facts and documents about which there can be no reasonable dispute, including but not limited to the following:
 - a. The legal name of the respondent and, if appropriate, the state of incorporation and the location of its principal office.
 - b. Facts which indicate whether the respondent was engaged in a business affecting commerce at the time of the alleged violation.
 - c. The relative size of the respondent's business during the year immediately preceding the alleged violation compared to that of other firms engaged in the same or similar business in the same general geographic area.

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- d. The net worth of the respondent for the fiscal year immediately preceding the year in which the alleged violation occurred.
- e. The fact of employment by the respondent of any person injured at the time and place of the alleged violation.
- f. The ownership or control by respondent of any equipment or machinery, the use of which is referred to in the Citation.
- g. The average daily number of employees of the respondent during the current or most recent calendar year.
- h. The history, if any, of previous violations by the respondent of any law or regulation affecting the safety or health of employees.
- i. When and where the respondent posted the Citation, Notice of Contest and Notice of Hearing herein.
- j. The scope of authority of any witness who is an officer or employee of the respondent.
- k. The authenticity of any document or writing which a party proposes to offer at the hearing.
- l. The validity and reliability of any statement in any document proposed to be offered in evidence, including but not limited to figures, computations, percentages, and projections.
- m. Any other fact or matter not in dispute which may aid the Review Commission Judge in the expeditious disposition of this proceeding.


JOSEPH CHODES
JUDGE, OSAHRC

Enclosure

BURLINGHAM UNDERWOOD & LORD

HERBERT M. LORD
HERVEY C. ALLEN
ELLIOTT B. NIXON
WILLIAM M. KIMBALL
ELKAN TURK, JR.
JAMES W. LYNCH
KENNETH H. VOLK
JOSEPH C. SMITH
ROBERT B. POHL

JOHN S. ROGERS
L. ASHLEY ROBINSON
DAVID L. FOBES
MICHAEL MARKS COHEN
JOHN F. O'CONNELL
EUGENE UNDERWOOD
CHARLES BURLINGHAM
PAUL VAN ANDA
COUNSEL



25
TELEPHONE: 212 422 7585
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TWX: 710 581 6236

25 BROADWAY, NEW YORK, N.Y. 10004

August 5, 1974

Judge Joseph Chodes
Occupational Safety & Health Review Commission
Room 3800
1515 Broadway
New York, New York 10036

Northeast Marine Terminal Company, Inc.
Docket 8221

Dear Sir:

Pursuant your instructions dated July 22, 1974:

Respondent may call as a witness its safety director, P. Kiplock, who is an expert on terminal activities and who may testify concerning specific facts of each claimed violation, and such other witnesses as may be needed to contradict or impeach any witness or exhibit called or offered by complainant, and to lay foundation for introduction by respondent of any exhibit needed for such contradiction or impeachment.

Respondent foresees the following issues, among others:

1. Did each claimed violation occur?
2. Was there any repeat violation?
3. Is respondent liable for any claimed violation?
4. Is each proposed penalty proper?
5. Whether any proposed penalty should be vacated or modified?
6. Is respondent liable for any proposed penalty?

Judge Joseph Chodes

2.

7. Whether respondent was timely notified of any claimed violation or proposed penalty?

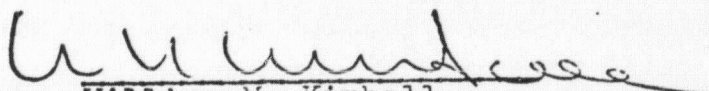
8. Whether notice to respondent of any claimed violation or proposed penalty was made in accordance with the Occupational Safety & Health Act of 1970 (29 U.S.C. 651, et seq.), as amended, and regulations and directives made pursuant thereto?

9. Whether said Act, as purported to be applied in this proceeding, is Constitutional?

10. Whether application of said Act, as purported, would deny respondent due process and equal protection?

Enclosed is copy of Mr. Kimball's notice of appearance as respondent's counsel.

Respectfully yours,


William M. Kimball

WMK:rb
Encl.

cc: Francis V. La Ruffa, Esq.
Regional Solicitor
United States Department of Labor
Room 3555
1515 Broadway
New York, New York 10036
Attention: Theodore T. Gotsch, Esq.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

APPEARANCE

In the Matter of: Secretary of Labor v. Northeast Marine Terminal
Company, Inc.

OSAHRC
DOCKET NO. 8221 (JC)

Enter my appearance for

NORTHEAST MARINE TERMINAL
COMPANY, INC.

William M. Kimball
~~William H. Kimball~~
25 Broadway
NY NY 10004
(212) 422-7535
(Insert name, address & telephone number)

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

-----X

PETER J. BRENNAN, SECRETARY OF LABOR
UNITED STATES DEPARTMENT OF LABOR,

DOCKET NO.
8221

vs.

NORTHEAST MARINE TERMINAL COMPANY
FOOT OF 39TH STREET,
BROOKLYN, NEW YORK

RESPONDENT

BEFORE: JUDGE JOSEPH CHODES

September 13, 1974
at
1515 Broadway
New York, New York

S & S REPORTING COMPANY, INC.
132 Nassau Street
New York, N. Y. 10038

A P P E A R A N C E S:

MR. FRANCIS V. LA RUFFA

Regional Solicitor

1515 Broadway

New York, New York

BY: WILLIAM T. GOTSCH, ESQ. Of Counsel

WILLIAM M. KIMBALL, ESQ.

Attorney for Respondent

25 Broadway

New York, New York

JUDGE CHODES: The Hearing in the case of the Secretary of Labor Complainant versus Northeast Marine Terminal Company as Respondents, Docket No. 8221 is now open.

Let the record show that the place of the Hearing is at the United States Department of Labor at 1515 Broadway, New York, New York. The date is September 13, 1974.

The Reporter is Harold Swiss who will record the Hearing by means of a stenographic Machine.

Mr. Swiss, will you rise and raise your right hand.

(Mr. Harold Swiss, the Stenographic Reporter was then duly sworn.)

MR. CHODES: The record shows that a representative of the Secretary of Labor, the Complainants herein served the Respondent with a citation for violation of the Occupational Safety and Health Act of 1970 and with a notification of proposed penalties under the provisions of Section 9 and 10 of the said Act.

The Respondent filed with the Secretary a Notice of Intention to contest the citation

and the proposed penalties, and upon the filing of the Notice of Contest with the Secretary, jurisdiction was conferred upon the Occupational Safety and Health Commission under the provisions of Section 10 (c) of the Act.

Will the representatives of the parties to this proceeding please state their names, addresses for the record, beginning with the representative of the Secretary of Labor.

MR. GOTSCH: My name is William T. Gotsch, Attorney for the Regional Solicitor, the United States Department of Labor, 1515 Broadway, New York, New York.

MR. KIMBALL: My name is William M. Kimball. I am the Attorney for the Respondent and I am located at 25 Broadway, New York, New York 10004.

JUDGE CHODES: Are there any other representations?

(No response)

Let the record show that there was no response. Are there any stipulations?

MR. GOTSCH: I am not aware of any, your Honor.

JUDGE CHODES: Mr. Gotsch, do you wish to make an opening statement?

MR. GOTSCH: No, your Honor. We will waive the opening statement.

MR. KIMBALL: I would at this time note your Honor's authority under the Occupational Safety and Health Review Commission rules of procedure number 66 (h) to entertain and determine the motions to dismiss complaints.

I now make such a motion and also move to vacate the citation and the proposed penalties on the following grounds concerning which I respectfully request a ruling. If the ruling is adverse to me, as I cannot conceive, then I have additional supporting grounds, but I would like to move step by step to the first ground of the motion which is very easily stated.

Somebody made some inspection on April 3rd and 4, 1974. The citation and notification of 7 non-serious violations purportedly relating to that inspection as dated was made one for 1974 and was received by the employer on or

about May 16, 1974, roughly one month and two weeks or approximately six weeks after the asserted inspection. No doubt your Honor. will recall that on April 22, 1974, the Department of Labor issued a program directive number 200-28 which by itself determines what is effective immediately. If I understand correctly, after pointing out that under Section 9a of the Act, citations shall be issued, "with reasonable promptness", and referring to legislative history, indicative of an intent by Congress that such citations be issued not less than 72 hours after the inspection, the directive goes on to refer to the Occupational Safety and Health Commission as holding that absent exceptional circumstances, such as citations must be issued within 72 hours of the Area Directors decision that a violation has occurred.

I suppose the decision to which the directive refers is that of a decision in a Chicago Bridge and Iron company matter which

is Docket Number 744, decided January 24, 1974, wherein the Commission reversed a Judge and dismissed or vacated a citation because of a four week delay between the inspection and the issuance of the citation. Therein referring to the requirements of Section 9a of the Act of the Congressional intent and of the 72 hour thumb rule-- here we have a situation in which citations and proposed penalties were issued, as I said, about six weeks after the inspection. They were issued in the teeth of the directive. You may recall that the directive was effective as of April 22, 1974, so about a month later in violation of a directive, somebody saw fit to send along to Northeast Terminal these citations and notifications.

Accordingly, I respectfully move, your Honor, to dismiss all and sundry.

MR. GOTSCH: I would like to comment on the Chicago Bridge and Iron case and the numerous review Commission cases that have developed from it. Respondent in this case raised an objection based upon reasonable

promptness. However, this Chicago Bridge and Iron case makes clear there is an affirmative defense pleaded and moved at the time of the Hearing. I think that any motion to dismiss before any evidence has been submitted to the Court is very premature.

So, I would move that the motion be denied and the Respondent provide whatever evidence it chooses to with the issue of reasonable promptness.

JUDGE CHODES: I will deny the motion.

MR. KIMBALL: I take exception, pointing out that you judicially know what is in your file. I know all of the dates that I mentioned to you. Now, I renew the motion on the following additional grounds.

On the same date of April 3, 1974, an inspection was made at what was called the 39th Street Terminal of which the employer, Respondent, in this case is partial lessee, but apparently the same individual who, on or about April 15, 1974, caused the citations and notifications to be issued to the Northeast

Stevedoring Company for some 15 Claimant non-serious violations.

That citation and notification, dated April 15, 1974 was received by that employer about April 15, 1974 or roughly two weeks after the inspection, even though it was not within the 72 hour rule and after discussing the matter with me and considering the practicalities of the matter and most important, assuming any reasonable person would, that the Government was not going to be anybody else,-- and to date on the basis of an April 3, 1974 inspection at the 39th Street Terminal--- in other words, this was the whole thing. They were going to be 15 non-serious violations claimed so, because of the practicality of the matter, on my recommendation, that employer did not contest the citation and proposed penalties and in fact pay them.

You can imagine how suprising it was for me to learn that a month later, based upon those same inspections the Respondent in this

case has received another edict of seven non-serious Claimant violations. This is clearly in violation of due process, and for that I renew the motion to dismiss the complaint and the citation and the proposed penalties and I really think I am perhaps not doing the full measure of my responsibilities, but I will direct that a motion only in respect to the citation and proposed penalties to the Respondent Northeast Terminal and won't at this time, but without prejudice, however, attempt to undo the harm that has been done to the Northeast Stevedoring.

MR. GOTSCH: Your Honor, again, the decisions in the Chicago Bridge and Iron indicate that the Secretary, when he has good reason, can issue a citation in excess of 72 hours, and again, this is a matter to be an affirmative defense of the Respondent and evidence must be taken of this point before any decision can be made.

JUDGE CHODES: I am not sure that I understand exactly what happened. What is the

same situation?

MR. GOTSCH: Well, at this work site, apparently the two corporations, Northeast Stevedoring and Northeast Maritime Terminal were inter-related terminals and responsible for this job site. Some of the violations, the Compliance Officer was told, pertain to one employer and some of them to another, and that is the reason why the two separate citations were issued.

JUDGE CHODES: Different Respondents?

MR. GOTSCH: Two different Respondents, all the corporate officers are the same, the officers are the same, as they are inter-related corporations, although they are two different corporate entities, but virtually they are the same corporate setup.

MR. KIMBALL: I respectfully suggest for your Honor or that the Government's statement of this matter show how bizarre it was for somebody to go down there, make an inspection, apparently not knowing the difference between one corporate entity and the

other on the basis of somebody's say so and apparently delved it out the violation, deciding which belonged to one employer and which belonged to the other. If the Government sees fit to issue a citation to one of them two weeks after the inspection, and to the other one one month and two weeks later--

JUDGE CHODES: I will deny the motion.

MR. KIMBALL: I take exception, again pointing out that you must judicially know all of the facts which have been incorporated in the motion which I have made.

JUDGE CHODES: Any further motions?

MR. KIMBALL: Not at this time.

I will be happy to waive the opening statement unless your Honor feels it is incumbent upon me to make one opening statement.

MR. GOTSCH: I call Mr. Joseph D. Martino to the stand.

Thereupon,

MR. JOSEPH D. MARTINO,
of 90 Church Street, New York, New York, was duly called
as a witness for and in behalf of the Secretary of Labor,

United States Department of Labor, and being then and there duly sworn by Judge Chodes, assumed the witness stand, and upon examination, testified as follows:

JUDGE CHODES: Please state your name and address for the record.

WITNESS: My name is Joseph D. Martino.
I am at 90 Church Street, New York, New York.

DIRECT EXAMINATION

BY MR. GOTSCH:

Q By whom are you employed?

A The United States Department of Labor,
Occupational Safety and Health Administration.

Q How long have you been so employed, sir?

A Three years.

Q What type of work have you done prior to joining the Occupational Safety and Health Administration?

A Related to Safety and Investigation for Self Insured Stevedoring and Shipping.

Q What is the name of that company?

A The Hogan and Sons, Inc.

Q How many years were you involved with that?

A 25 years.

Q What was your job with the Hogan and Sons?

A Manager of Safety, Compensation Liability Investigation and Ships.

Q Were you employed by any other employer prior to joining the Occupational Safety and Health Administration?

A No, sir.

Q Mr. D. Martino, during the course of your duties with the Occupational Safety and Health Administration, did you have occasion to investigate the Northeast Marine Terminal facilities at the Foot of 39th Street in Brooklyn, New York?

MR. KIMBALL: That begs the question. I object to the question. It assumes that he knows what the Northeast Marine facility is. . That has not been established.

JUDGE CHODES: Do you know where the Northeast Terminal is?

WITNESS: Yes, sir. I was assigned there. Just to go back off the record--

MR. KIMBALL: I object to anything off the record by this witness.

WITNESS: My Attorney asked me if I had worked for somebody else. I worked for somebody

else after leaving--- I worked for Universal Terminal and Stevedore and I do know where the Northeast Terminal is.

Q Mr. D. Martino, when did you make this inspection?

A April 3 and 4 of 1974 and I was assigned to conduct an inspection at the Northeast. It wasn't designated if it was Northeast Terminal or Stevedore.

Q What is the physical property of this particular facility?

A They occupy acreage on the foot--- a considerable amount of acreage on the Foot of 39th Street in Brooklyn and there are sheds and berths, and at that time newly installed cranes for a container operation.

Q How many piers are involved in this particular facility?

A It is several piers that have been consolidated into one complex.

Q Did you meet with any representatives of this firm at the time of the inspection?

A I met with Mr. Chiplock. He is a Safety Director of the Terminal and the Shop Steward, and

I believe Mr. Viola, the Vice President of the firm.

MR. KIMBALL: What firm?

MR. GOTSCH: Just a minute.

MR. KIMBALL: I move to strike the answer.

They have no proper value - unless we know what firm he is talking about. By his own testimony he doesn't know if he is going to the Northeast Terminal or the Northeast Stevedoring. He goes to the Foot of 39th Street and finds there are several piers which he must be wandering all over the place and he sees Mr. Viola --

MR. GOTSCH: Just a minute, are you testifying in this case. You will have an opportunity to be sworn if you intend to testify. I read the rules.

MR. KIMBALL: It doesn't say anything about this witness's Attorney, as he calls him, my Attorney, it doesn't say anything about any Attorney making the rules. I suppose your Honor would make all the rules.

MR. GOTSCH: Mr. Kimball, if you have an objection you may say it.

MR. KIMBALL: Object to the answer as

meaningless.

JUDGE CHODES: The answer is allowed to stand.

MR. KIMBALL: I move to strike the answer.

JUDGE CHODES: Denied.

MR. KIMBALL: Exception.

Q Were you able to identify the inspection? You spoke to Mr. Chiplock?

MR. KIMBALL: Objection. No foundation for the question.

JUDGE CHODES: Overruled. You may continue.

WITNESS: I have previous knowledge that Mr. Chiplock was Safety Director for the Northeast, and I had a discussion

JUDGE CHODES: You are speaking a little too fast.

Q Mr. D. Martino, you stated you understood he was a Safety Director of the Northeast. Can you be a little bit more specific?

A There are several corporations identified with the term Northeast-

MR. KIMBALL: Object to the question on the

grounds of the firm.

JUDGE CHODES: Overruled.

MR. KIMBALL: Object to the question and/or conclusion of this witness as being with no foundation whatsoever.

JUDGE CHODES: Overruled.

WITNESS: I had previous knowledge that Mr. Chiplock was the Safety Director for the Northeast Stevedore and I had occasion to meet him on several occasions prior to the inspection date, and we spent about an hour together discussing the inspection and the area to be covered.

Q Mr. D. Martino, you stated you spoke to a Mr. Viola. Do you know by whom Mr. Viola is employed?

MR. KIMBALL: Same objection.

JUDGE CHODES: Overruled.

MR. KIMBALL: Would you be so kind as to permit me to perform my lawyer function by taking objections and stating them completely on the record before you overrule them. The record ought to reflect at this time that about halfway through the first sentence, your Honor

Martino Direct

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has overruled my objection. Would you like to hear them before you make your ruling? I was sent here for one purpose only, to take objections to objectionable material and if I cannot do this before you, then I will make the 67b motion and ask for time to fill the necessary papers out after I get the record.

JUDGE CHODES: You may continue, Mr. Gotsch.

CONTINUED EXAMINATION BY MR. GOTSCH

BY MR. GOTSCH:

Q With respect to Mr. Viola, did you determine who he worked for, Mr. D. Martino?

MR. KIMBALL: Same objection.

JUDGE CHODES: Overruled.

WITNESS: I understood I worked for Northeast Stevedore.

MR. KIMBALL: I move to strike the answer.

JUDGE CHODES: Overruled.

Q Did you make this determination?

A On a brief inspection, probably 1973 Mr. Viola was checking cargo on the pier on one of the sheds.

Q Mr. D. Martino, how many times did you inspect on April 3 and 4?

MR. KIMBALL: Objection. No foundation.

JUDGE CHODES: Overruled.

WITNESS: Northeast Stevedore and during the inspection was informed by a Mr. Magna who is Engineer Manager, of the terminal for the Stevedore and was found at a work site, and Mr. Chiplock informed me that Mr. Magna was taking care of this particular operation that we came about upon the inspection of the sheds.

MR. KIMBALL: I move to strike the answer as not responsive and containing a great deal of otherwise inadmissible guess work and hearsay by this witness.

JUDGE CHODES: Overruled.

MR. KIMBALL: I would like to hear the question and the answer again.

(The Reporter read the previous question)

MR. KIMBALL: Having had a reading of the question and the answer, I respectfully ask your Honor to reconsider the overruling of the objection. The answer was not responsive to the question and containing inadmissible testimony by this witness.

JUDGE CHODES: Often a witness will answer

Martino .. Direct

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in such a manner that it is not absolutely in response to a question, but usually, and in this particular case, it is. And I am overruling your objection. Witness has to have some flexibility. If you are going to object to everything he says regardless of the pertinence or importance, we could be here all day before this witness gets off the stand.

MR. KIMBALL: I suggest that we have here a Government witness so closely identified with the prosecution that he refers to the lawyer questioning him as "my lawyer". This is not the first time this witness has testified in proceedings of this sort and by now he should have learned and if he hasn't learned, he should be trained to answer the questions and not volunteer things which may or may not be detrimental to the party against whom the Government is conducting its prosecution.

JUDGE CHODES: (To the witness) You may continue.

CONTINUED EXAMINATION BY MR. GOTSCH

Q Mr. D. Martino, during the course of this inspection,

you had a discussion with Mr. Chiplock relating to Mr. Magna at the Northeast Terminal?

A Yes, sir.

Q Could you describe for the Court the substance of your conversation?

MR. KIMBALL: Object. It is inadmissible hearsay.

JUDGE CHODES: Overruled.

WITNESS: Mr. Chiplock explained that Mr. Magna was the Engineer of the Terminal and he was in charge of the operation that we were looking at at the time and he suggested that I go over to Mr. Magna and clear up the situation with him that we came upon during that inspection. So, I went over to Mr. Magna and I advised him, you know, to clear up the situation that was present at the time that bordered on imminent danger and I identified myself and told him I was with Mr. Chiplock and he abated the condition immediately.

JUDGE CHODES: Mr. Gotsch, are we getting into another Citation?

Martino - Direct

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MR. GOTSCH: There was another Citation issued, as Mr. Kimball has alluded to which was not contested and is not part of the Hearing. We are not attempting to prove any violations on the other Citation.

JUDGE CHODES: Mr. Magna, he is connected with the other corporation?

MR. GOTSCH: The case we have before us is the Northeast Marine Terminal, Inc. The other Citation involved Northeast Stevedoring Company.

JUDGE CHODES: Do we need to go into that aspect of the case? Can't we limit the proceedings to what effects the Northeast Terminal?

MR. GOTSCH: I will attempt to do that, your Honor. That is my intent, not to get into the other Citation.

CONTINUED EXAMINATION BY MR. GOTSCH

Q Mr. D. Martino, you stated you had an opening conference with Mr. Chiplock; is that correct?

A Yes, sir.

Q Who accompanied you during the course of your inspection?

A Mr. Chiplock and the Shop Steward.

Q The Shop Steward, can you identify him by name?

A Mr. Ciccone. Mr. Santos, Shop Steward,
Local 1814 I.L.A.

JUDGE CHODES: Where did you get that
information? What is the name of the Shop
Steward?

WITNESS: Mr. Santos, Mr. Ciccone.

CONTINUED EXAMINATION BY MR. GOTSCH

Q How did you know he was the Shop Steward?

A I know him, and he also spelled out his name
for me while I was making out the necessary
forms for inspection.

Q Mr. D. Martino, referring to the inspection of
Northeast Marine Terminal, I want you to describe
the inspection, and as a result of that inspection,
you recommended that a Citation be issued for
alleged violations of 29 CFR 1910.17m3. With
respect to the operation of a high-low vehicle.
Can you describe to the Court what you observed
that led you to recommend that this Citation be
issued?

MR. KIMBALL: If that is a question, I
object to it. It sounds like a speech. I thought

the question was will you describe for us the inspection which you made at the terminal, and I was going to object to that on the ground that he begged the question since this man has not yet, to my way of thinking, established that he knows the difference between the terminal inspection and the Stevedoring inspection. Then the Government proceeded merely along and ask it for some specifics concerning some particular vision which somebody or other decided belonged to the terminal. I start off by objecting to the question just on the ground of form.

JUDGE CHODES: Well, I think you could be a little bit more specific as to what you want the witness to answer.

MR. GOTSCH: All right, your Honor.

CONTINUED EXAMINATION BY MR. GOTSCH

Q Mr. D. Martino, you stated that Mr. Chiplock and Mr. Ciccone were present during the course of that inspection?

A Yes.

Q During the course of the inspection, you recommended

various Citations be issued to the Northeast Terminal; is that correct?

A Yes, sir.

Q How did you make that determination that certain violations were to be cited to Northeast Terminal Incorporated as opposed to any other employer that might have been at the job site?

A At the conclusion of the two day inspection, Mr. Chiplock and I held a closing conference and at that time we had a total of some 27 odd violations, and during the discussion, Mr. Chiplock suggested there were too many to lay off on the Stevedore and they should be separated between the Stevedore and the Terminal operation because the Stevedore did one function and the Terminal did another function. Where the Terminal made repairs and provided proper roadway and fire equipment and whatever was necessary to maintain a good place to work and the building and shed and equipment, whereas the Stevedore's primary function was to load and discharge vessels and store the cargo and remove it from the sheds and load and discharge trucks. We went down the list and separated some Terminal operational factors and citable conditions

and put those for the Terminal side, and the others were for the Stevedore.

Q Who helped you make this determination?

A May I complete--

Q Answer the question I have now. Who assisted you in making the determination whether certain violations pertained to the Northeast Marine Terminal while other Terminals pertained to other and laid off-

MR. KIMBALL: This is an objection. They laid some off on the Terminal because there were too many for the Stevedore to have and there hasn't been any testimony that any determination was made, that they were Terminal violations, they laid some off on the Terminal. So the Government's question is without foundation.

JUDGE CHODES: Mr. Gotsch, I am not sure, unless you are asking him whether another person was present beside Mr. Chiplock or --

MR. GOTSCH: I wanted to determine who was present when these determinations were made.

JUDGE CHODES: Why don't you ask that question?

CONTINUED EXAMINATION BY MR. GOTSCH

Q When the determination was made to issue certain Citations to Northeast Stevedore and other Citations for alleged violations of Northeast Marine Terminal, who provided you the information that enabled you to make the determination as to which employer was to be cited?

A Mr. Chiplock and I made the determination of which violations would be cited for the Terminal and which would be cited for the Stevedore and the term "laid off" is my term and it is only a question of separation--

JUDGE CHODES: What was the last statement?

WITNESS: The term "laid off", it is nothing. The word we agreed to lay off this or do that, it is only my terminology, "laid off".

MR. KIMBALL: I move to strike that latter part as not responsive to any question and self-serving explanation by the witness who obviously is in a very delicate position right now.

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JUDGE CHODES: I will allow the answer to stand.

CONTINUED EXAMINATION BY MR. GOTSCH

Q Mr. D. Martino, there were certain violations that you recommended that Citations be issued to Northeast Terminal and I am going to ask you to describe the conditions that led you to recommend these violations be cited. I note that you cited Northeast Terminal-- and before you answer, Mr. D. Martino, I would ask you, to refresh your recollection. Do you need to review the investigation file or are you able to recall the details sufficiently without such recollection?

A I have to look at the number to see what you are referring to.

Q So you are referring to the Citation, is copy of the Citation?

A Yes, sir.

Q With respect to the Citation of the alleged violation of the regulation that I asked you, could you describe the conditions with respect to the alleged violation?

A There was a high-low moving across the area

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and two people were driving it and one partially hung over the machine and the machine number 19, and during the closing conference Mr. Chiplock stated that since there was no ship working, these people were involved in a Terminal operation, and this was a Terminal violation according to the discussions we were having.

MR. KIMBALL: I move to strike the answer on the grounds that it is inadmissible hearsay.

JUDGE CHODES: I will overrule your objection. I will allow the answer.

Q Mr. D. Martino, were any ships working at that particular time?

A I believe one came in during the conclusion of the inspection and we did not go aboard.

Q Based upon the fact that at the time you made your observation, there were no ships working, was that the reason that Mr. Chiplock indicated this was a Northeast Marine Terminal?

MR. KIMBALL: Objection.

JUDGE CHODES: I think you ought to rephrase that.

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MR. KIMBALL: Move to strike the answer which this witness improperly gave after your Honor sustained, maybe the first time sustained, an objection to one of my objections. I move to strike the answer. I move that he be instructed not to willfully give answers after your Honor has ruled it that the question was improper.

JUDGE CHODES: There was no answer.

CONTINUED EXAMINATION BY MR. GOTSCH

Q Mr. D. Martino, did you determine who the employees were that were riding on that high-low vehicle?

A I believe there was a Mr. Lennon went off and talked to them and Mr. Chiplock and I told them to get off the machine and that the riders were not allowed. If I remember, I did most of the talking and explained to the men that they were not permitted to ride the machine unless another seat was provided.

Q How many seats were provided on this particular machine?

A One.

Q Where was the second individual riding?

A On the body of the machine with his body partially over the lines of the machine.

Q Could you describe this high-low vehicle? What is the size of this?

A Well, roughly about three and a half feet in width, about four feet off the ground to the seat level and provided with a boom, hoisting mechanism and set of forks at the front end to lift cargo or material with. The wheels are low to the ground and the body is also within three inches of the ground except for the wheels which are cut out providing rotation of the wheels under the body.

Q Mr. D. Martino, did you recommend that a Citation be issued for this particular condition?

A Yes, I did.

Q What type of Citation did you recommend in this instance?

A Non-serious in this particular case.

Q What was your reason that you considered this to be a non-serious violation?

A There was violation of a standard which we checked with the office and I was advised by the review that I spoke to that this had previously been issued and this was to be considered a repeat

violation, and I wrote it as a repeat non-serious.

Q How did you compute the penalty with respect to this violation?

A Well, first of all, on the repeat, I gave them no credit for that.

Q You gave them no credit for what?

A For history, on past history, we gave them no credit, and due to the gravity of the violation, the gravity of the violation, the penalty was assessed at \$200.

Q You say that the gravity of the violation, what factors did you take into account with respect to the gravity of the violation?

A Coming in contact with the other equipment or running up against a pile or trucks and equipment, coming alongside of a backing -- the men could have been killed, could have been dragged under the machine or off the machine, could have been crushed against the machine, and there are previous injuries of that nature.

Q Mr. D. Martino, I have an exhibit here which I would ask to be marked as Complainant's Exhibit 1 for identification. Mr. Reporter.

(Whereupon the aforementioned document was marked as

Complainant's Exhibit 1 for identification, this date.)

MR. GOTSCH: I would like to give Mr. Kimball a copy of this exhibit.

MR. KIMBALL: Received.

CONTINUED EXAMINATION BY MR. GOTSCH

Q Mr. D. Martino, I show you Complainant's Exhibit 1 and do you recognize this document, sir?

A Yes, it is a notice that a Citation is being issued.

Q Could you look through the document of some 10 pages and tell me if you can identify what it contained in this document?

A Yes, Citations issued to the employer by the establishment, Northeast Terminal, Inc., by roughly about 8 or 7 violations.

Q Was there a proposed penalty involved with that?

A Yes, sir, penalty was proposed and, according to the first page, apparently it was paid.

Q What was the issuance date of this particular Citation?

A February 4, 1972.

Q I ask you to look at the Citation for the penalties and can you tell me whether this particular

Citation had any bearing on the determination to issue a repeated Citation in the instant inspection?

MR. KIMBALL: Objection. He never saw this thing before today. How can it have a bearing by what somebody did on May of 1974?

JUDGE CHODES: He knows if it has any effect on it in arriving at the penalty, so I will allow the question.

WITNESS: There is a 1910157a2. That is not it. It is 191017m3 prohibiting personnel for riding on industrial equipment. This is based upon information that I was given to write a repeat Citation.

MR. KIMBALL: I move to strike it. Opinion conclusion by this witness.

JUDGE CHODES: Motion denied.

Q Mr. D. Martino, is there any indication whether this Citation was contested?

A No, sir.

Q I note on the page one it states 10070, 2/15/72, paid.

MR. KIMBALL: I note what the Government is doing here and I am not familiar with. Either we have a document which ought to have

been admitted into evidence in which he would not have to listen to the witness's testimony, since you are, or the Government is reading into the record something from a document which is not received and not admissible in evidence, I object to the Government's question and respectfully beg the Government to please not to do this because of the criminal nature of these proceedings.

JUDGE CHODES: I don't understand the last remark.

MR. KIMBALL: Somebody is going to have to pay some money here in a quasi criminal case, and particularly it behooves the Government to scrupulously observe the most basic rules of evidence. Either they put a piece of paper in evidence or they don't read or recite from a piece of paper which is not in evidence.

JUDGE CHODES: There are many occasions when documents are referred to and not put into evidence, and to refresh his recollection--

MR. KIMBALL: If I understand this witness's

testimony, it doesn't refresh his recollection. We know that he had nothing to do with the penalties at all that happened. He called, somebody and somebody told him that this was to be classified as a repeater. That who was and upon what basis this someone told this functionary to classify this as a repeater, we know not, and neither does he.

JUDGE CHODES: He just testified as to what he did. How he arrived at the assessment of the penalty, it is based upon this document.

MR. KIMBALL: It hasn't been established that he assesses penalties. If he recommends an assessment, we should have here the person who made the assessment, not someone who made the recommendation. How can he, the witness, testify to the state of mind of the person who made the penalties, and what considerations that person took into account in coming up with the penalties.

If we are going to have that sort of testimony, we ought to have testifying the person who made that decision, not the person whom the Honor knows made some recommendation.

JUDGE CHODES: You may proceed, Mr. Gotsch.

MR. GOTSCH: I move that this document be accepted into evidence as Complainant's Exhibit 1.

MR. KIMBALL: I object to that.

JUDGE CHODES: On what grounds?

MR. KIMBALL: Not being identified in the first instance and it is irrelevant to these proceedings, and thirdly, perhaps in somebody's mind, maybe your own, we go back to January, 1972 and in respect to a lot of things and which could conceivably prejudice my client's position in respect to what happened in April, 1974. It is a smear, in other words.

JUDGE CHODES: Mr. Gotsch, could you identify the document as to what it is?

CONTINUED EXAMINATION BY MR. GOTSCH

Q Mr. D. Martino, I ask you to look at this document and identify it to the best of your ability?

MR. KIMBALL: We can all read, but here is a question really, it is not being established and I gather from a rather circuitous way, it is implicit in its questioning that this witness

had nothing to do with the preparation of this document. This witness is testifying concerning his duty and it would not cause me to believe that he is the custodian of any Government documents. What we have here is a witness room for convenience sake and not, which is the Government, gets something out of a file and hands it to this witness who has nothing to do with the making, keeping, safeguarding, or production of a piece of paper and he can read apparently, so he is going to identify the piece of paper. He is incompetent to answer the question which is posed.

JUDGE CHODES: I will permit him to answer.

CONTINUED EXAMINATION BY MR. GOTSCH

Q Can you identify this document, Mr. D. Martino?

MR. KIMBALL: Can't we have it established did he have anything to do with the preparation of this document?

JUDGE CHODES: Do you want a voir dire?

MR. KIMBALL: Yes.

VOIR DIRE EXAMINATION

BY MR. KIMBALL:

Q Did you make this document or did you keep it?

A No, sir.

Q Have you ever seen it before today?

A No, sir.

Q Did you produce it?

A No, sir.

CONTINUED EXAMINATION BY MR. GOTSCH

Q Is this document a document that is kept in the course of business by the Occupational Safety and Occupation?

MR. KIMBALL: Objection; no foundation for that.

JUDGE CHODES: He works there. I will allow him to answer that.

WITNESS: Yes, sir.

Q Can you identify that document for the Court, please?

MR. KIMBALL: Obviously he cannot identify it on the basis of the Voir Dire.

JUDGE CHODES: I will overrule your objection.

WITNESS: It was made out by a Compliance Officer 27748, which happens to be Dave Quali.

JUDGE CHODES: Is this an office document,

in your office?

WITNESS: Yes, sir.

Q What is the official title of this particular document or is there more than one? Please relate that to the Court?

A The cover letter or the alleged violations and attached paper is the violation, the alleged violation sheet which amends the Citation number, the item number of the violations and enclosed to which I explained each Citation and numbers and one is a return receipt which shows delivery.

JUDGE CHODES: Did you use this document or have access to this document when you arrived at your penalties?

WITNESS: No, sir. I thought how I explained how I was advised

JUDGE CHODES: You were told that previous violations had occurred; is that what you said?

WITNESS: Yes, sir.

JUDGE CHODES: Who told you that?

MR. KIMBALL: Objection.

WITNESS: Mr. Bill Donn was sitting in as

an Assistant Area Director and advised me by phone that this was a repeat violation.

JUDGE CHODES: Mr. Gotsch, Mr. Martino can't testify what he was told, but I don't think the document can't be introduced in evidence on the basis of what we have so far, so if you will need to have the document in evidence, you can have someone who can identify it.

MR. GOTSCH: All right.

CONTINUED EXAMINATION BY MR. GOTSCH

Q In any event, the total penalties you proposed was how much, sir on this particular item?

A \$200.

Q Did you go over this recommendation with anyone?

A The Area Director who reviews all the penalties, and it is at his option whether to up them or down them.

Q Did he make any change on this particular proposed penalty?

A No, sir, no change on it.

Q Mr. D. Martino, during the course of your inspection-

JUDGE CHODES: Before we get off on this

one, with respect to penalties, I think we ought to cover the other factors that enter into it.

MR. GOTSCH: I will, your Honor. I think Mr. D. Martino alluded to it in this case.

CONTINUED EXAMINATION BY MR. GOTSCH

Q Mr. D. Martino, did you make any computations-- did you go to the gravity of the violation you proposed a \$200 penalty, did you take any other factors into account in arriving at the ultimate proposed penalties?

A Yes, the possibility of an accident.

Q I think you did testify about that. Were there any other factors?

A And result in injury.

Q That goes to the gravity?

A And the amount of time that it happens, whether regularly or hardly or ever happened before and in this case, it was a repeat, so on the basis of that history, no credits were submitted.

Q Were any other credits submitted for this particular item of the Citation?

A Not the size of the company, because they were over 100 employees in the plant and good faith, 10% was allowed because of the immediate abatement of other conditions that came, that we came across and the cooperation received during the inspection over the two days.

Q Was this good faith credit given on this particular item?

A No credits are given on repeat items.

Q No credit of any kind?

A No, sir.

Q Is it your testimony, Mr. D. Martino, that the proposed unadjusted penalty was identical with the final proposed penalty?

A Yes, sir.

Q Mr. D. Martino, during this course of the inspection, you recommended that a Citation be issued for an alleged violation of 29CFR1910.29F?

MR. KIMBALL: I want to inquire concerning that. Your preference on procedures. There seems to be about seven Citations here. Is it your preference that the Government go through the whole seven and then I cross x later on seven or would you prefer that we

have cross examination on these Citations one after another?

JUDGE CHODES: Normally, if there is a few, I will let the Government go through them. Seven I think is an in between number. You can agree with the cross examination and at the conclusion of the Complainant's case, I see no objection to that.

MR. GOTSCH: Your Honor, I have no particular preference. Whichever is more convenient for the Respondent is fine with me.

(Off the record discussion)

JUDGE CHODES: We will have the cross examination on the first item and I will ask the Reporter if he wants a recess.

(A five minute recess was declared)

Time noted was 11:25 to 11:40.

CROSS EXAMINATION BY MR. KIMBALL.

Time noted was 11:40, this date.

Q You made these inspections on April 3 and 4 of 1974; is that correct?

A Yes, sir.

Q The Citation issuance date is May 14, 1974; is that correct?

A Yes, sir.

Q The proposed penalties issuance date is also May 14, 1974; is that correct?

A Yes, sir.

Q You made your inspections at Northeast; is that correct? That is what they told you to do, to go inspect Northeast?

A That is right.

Q You found the premises at the Foot of 39th Street?

A Yes.

Q There was considerable acreage there?

A Yes, sir.

Q There were several piers?

A I knew them as several piers that had been consolidated into one complex.

Q This acreage run from about what street to what street?

A 39th Street North to about 36 or 35th, maybe 33rd Street.

Q You say it runs from 39 to 33?

A Right.

Q Is that correct?

A Yes, sir.

Q You met with Mr. Chiplock over that; is that so?

A Yes, sir.

Q You met a Viola?

A Yes, sir.

Q In 1974, you saw Mr. Viola checking cargo on the pier; is that right?

A During another inspection.

Q On the basis of that, you decided in April of 1974, Mr. Viola must be the Vice President of the Stevedoring Company; is that right?

A I didn't decide anything, no, sir. I inquired who was the President of the company and I noted this on the inspection report.

Q Who is the President of the company?

A Mr. Knight, I believe. I understood Mr. Viola to be the Vice President.

Q I thought you testified that the reason you thought Mr. Viola was Vice President, you saw him checking cargo on the pier?

A I think he was Vice President of the company and when I went looking for a company representative on another inspection, I found Mr. Viola on the pier checking the cargo and I had a discussion with him with regard to the inspection of a previous inspection.

Q How did you know he was Vice President?

A Because of a previous inspection I had made, not of my own papers.

Q Would you recall from your previous inspection the basis upon which you made the notes? In other words, did you see an office where it said, "Viola, Vice President?"

A When this is extraordinary.

Q How did you go about it? Did you check him up with some records?

A Yes. We know the officials of the company on the one c form, part of the inspection forms and we try to list the company officials: President, Vice President, or who accompanies on the inspection and who the employee representative is, who the employer representative is-

Q Other than your own self serving notation made on 1973, that Viola was the Vice President of the Stevedoring Company, what is the basis upon which you believe he was the Vice President of the Stevedoring?

A I don't understand your question.

Q Did somebody tell you he was Vice President?

A Yes, I said on the previous inspection I was

advised that he was the Vice President of the company.

Q Who said he was?

A I don't remember who said it.

Q You say Mr. Chiplock introduced you in April of 1974 to Mr. Magna; is that correct?

A It might be right.

Q Mr. Chiplock told you that he was the Engineer of the Terminal Company; is that what you testified?

A Yes.

Q Mr. Chiplock told you Mr. Magna was the President of the Stevedore Company?

A No, sir.

Q Didn't you testify in answer to one question that Mr. Magna was the Engineer for the terminal and about three years later and your answer was that he was the engineer for Stevedore?

A Not that I am aware of. I understood that Mr. Magna was the engineer for the Terminal and he fixes everything that has to be fixed on the Terminal that requires care and maintenance.

Q You mean he physically does it?

A He is in charge of it. He was in charge of the operation we were looking at at the time.

Q This high low?

A This lifting structural beam. The condition I went over to ask him was to abate.

Q The basis of your understanding is that somebody told you?

A Mr. Chiplock told me he was the man responsible for the operation and that he was in charge of the Terminal maintenance and the Engineer in charge and I walked over to him, introduced myself to him and I advised him of the purpose of our being there and I asked him to abate the condition that was an imminent danger at the time.

Q This high low?

A The high low, doing the job they were doing.

Q This is something we got some testimony on so far?

A No, sir.

Q Is this something involved in these proceedings?

A I don't know where you want to fit it.

Q It is a subsequent Citation in here.

A There is no subsequent Citation. It was not issued.

Q Was this something you discovered on April 3 and 4?

A During the inspection, yes, sir. This is how I

found Mr. Magna was the Terminal Engineer for Northeast Terminal, Engineer, Manager.

Q On the basis of something that Mr. Chiplock said to you, as you understood it?

A As I went over to Mr. Magna and subsequently he gave me a card.

Q Is that part of your file?

A I don't see it here.

Q Let us come to this so-called non-serious repeat violation. What number high low was involved in February, 1972 incident; do you know?

A No, sir.

Q Do you know whether or not it was high low number 19?

A No, sir.

Q Who owns high low number 19?

A You mean Northeast Stevedore or Northeast Terminal, I don't know.

Q Or somebody else?

JUDGE CHODES: He said he doesn't know.

Q There was a Mr. Quinn, a Mr. Lennon involved; is that correct?

A Yes, sir.

Q Who was driving?

A I don't remember.

Q Who employed the driver that day, the Terminal or the Stevedoring or somebody else?

A According to Mr. Chiplock, the Terminal.

Q That was Mr. Chiplock who told you?

A You mean specifically it was hired by the Terminal, he didn't say that.

Q Did you go and look at the payroll for that day of the Terminal or the Stevedoring to see which man was on what?

A No, sir.

Q How about the unauthorized rider. Do you know whether he was employed by anybody that day?

A No, sir.

Q When you say unauthorized rider, you mean that neither terminal nor stevedoring had authorized that guy to ride that machine?

A Only one person was authorized to operate the vehicle and only one man was authorized to be on the vehicle traditionally on two waterfronts for years and years and years.

Q Traditionally, on the waterfront for years and years and years, has it been your experience both when you were employed by a Stevedore or an Insurance

Company that the employer is constantly after these fellows to stay off the high lows and yet no matter what happens, somebody will always be riding one from time to time?

A I have seen other discharged employees riding equipment and that is a positive action.

Q Are you familiar that this has to do with your determination of whether this was a violation or was it a serious violation or a repeat violation. Are you familiar with the determinations by the Review Commission in Washington with respect to what is and what is not a violation of a hard hat regulations?

MR. GOTSCH: I object. I don't see any relevancy to this particular question.

JUDGE CHODES: I will sustain your objection.

Do you have a reason for asking it?

MR. KIMBALL: If my understanding is correct, for awhile local bodies, such as issue these Citations took the position if they went down to a Terminal and they saw one man without a hard hat, that constituted a violation and they issued a Citation and a penalty and after a while the Commission in Washington injected

some common sense in the situation by pointing out that even the most diligent lawyer, with the utmost of good faith, could not go around and hold the hats on these men. The most the employer could do was to make a reasonable effort to encourage the men to wear the hats, but in a society such as ours, involving a certain amount of free choice, you can't compel the men to physically wear hats.

I suggest, your Honor, that on the basis of this witness's testimony, the situation is identical here, to it: we have a company which does not permit people to ride on these high lows and the man is not authorized to ride on the high low, but still and all when you go there there is someone riding a highlow.

JUDGE CHODES: That is argumentative. You can make the argument when the time is appropriate.

MR. KIMBALL: I suggest that if we were conversant with the hard hat regulation -

MR. GOTSCH: I am going to object to any further reference to hard hats. I don't see any Citation pertaining to hard hats.

JUDGE CHODES: I have already ruled.

(Off the record discussion.)

CONTINUED EXAMINATION BY MR. KIMBALL

Q You say this entry, to it, the unauthorized rider on high low 19 occurred in a shed. Please tell me where the shed was?

A He was coming out of a shed.

Q Where was the shed?

A It was a 39th Street shed area, Southwest shed, at 3:30 P.M. and one of the men on board was a foreman. It was Mr. Lennon, foreman of the pier.

Q The Southwest shed; is that on the Foot of 29, 28, 27?

A Foot of 39.

Q At the Foot of 39?

A Yes, sir.

Q Who is the owner of that shed?

A Northeast.

Q On the basis of what information do you say that Northeast is the owner of the shed? Did you look at the papers on file in Kings County?

A No, sir.

Q Are you aware by any means that all these premises

are owned by the City of New York?

A The Authority operates it. The Port operates them.

Q Do you know the difference between the City of New York and the Port Authority who is the owner of the shed there?

A The City of New York.

Q Who is the lessee of the premises, do you know?

A No, sir.

Q You don't know whether the terminal or the Stevedoring or x leased that shed from the City, if anybody, do you?

A No, sir.

Q Did it cross your mind that this might be a City high low with City employees aboard in a City shed?

A It was up to Mr. Shiplock to advise me of the fact.

Q Does he work for OSHA?

A He worked for the employer that was being inspected at the time at the Northeast complex at the Foot of 39th Street and he was a representative of the employer.

Q So did there come a time when you were there at the

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issuance of the Citation against the employer, Stevedore and somebody suggested that the Citations against his employer Stevedore were too many?.

A No, sir.

Q So, according to your testimony you laid off some of those Citations on the Terminal?

A That is correct. Mr. Chiplock.

MR. KIMBALL: I have no further cross examination on this particular Citation, your Honor.

I don't know if it is possible to do this, but I certainly see no reason to subject you to a question and answer recitation by this witness of what appears in the Citation which forms a part of your file. I am perfectly prepared to stipulate if it is satisfactory to your Honor and to the Government that each and everyone of these Citations listed here were issued as a result and by reason of this man's visit to those premises on April 3 and 4 of 1974, and that he found substantially what is described in this Citation. If the Government wants to obtain

some additional details and particulars that will be entirely appropriate. But it seems quite unnecessary to have a repetition by this witness's questions and answers of what appears already in the Citation.

JUDGE CHODES: Well, what about the penalties? Are you satisfied that they are appropriate? We are not here making any particular issue about whether, for example, we are now going to go to a Citation Number 1, non-serious for which a penalty of \$50 was proposed. We don't argue with your Honor - or should it be thirty eight fifty or something of that nature. We don't quibble with you about the amount of any of these proposed penalties for non-serious non-repeat violations, whether \$50, \$90, or some of these other figures which are more or less accurate. We are not going to trouble your Honor with that.

MR. GOTSCH: If I understand the Respondent, your Honor, the objection is not to the issuance of the Citations per se but to the identification of Northeast Marine

Terminal Company as the responsible party for these seven particular violations; is that correct?

MR. KIMBALL: That is not correct. I object, of course, to the carried issuance of the Citations and proposed penalties which is the basis on the motions which I have made, and I object to the fact that the Government saw fit to issue one set of Citations a couple of weeks after the visit and another set of Citations a month and a half after the visit, but getting to the nitty gritty about whether or not these Citations were issued by this man following the visit to those premises, I certainly don't deny that.

JUDGE CHODES: The point is you concede that the information that is on the Citation is correct. In other words, you conceded that he did see and observe the conditions which are described. You are stipulating that these are the facts?

MR. KIMBALL: I will stipulate if this witness, when questioned painstakingly by the

Government Attorney, he would testify that he saw these things as set forth in this Citation.

JUDGE CHODES: Is that satisfactory, Mr. Gotsch?

MR. GOTSCH: That is satisfactory. That would be what we would attempt to prove here today.

MR. KIMBALL: Also if the Government wishes to elicit further details with respect to any of these, I repeat, I have no objection to that. He talks about a changed ladder. If for some reason the Government thinks it is necessary to have a further description of what that item is, let us go ahead. I am prepared to concede and do concede if questioned, this witness will testify that he observed the various things as described in the Citation as the result of his visit to the premises on April 3rd and 4th of 1974.

JUDGE CHODES: You are not offering anything to contradict that?

MR. KIMBALL: I wouldn't go that far, Judge.

JUDGE CHODES: Well, then, if you are going to offer or intend to offer any contradictory evidence, because there is a question of credibility coming up--

MR. KIMBALL: You go right ahead. I hoped we could save hours, about two hours. If you wanted, I can't do anymore.

JUDGE CHODES: What do you suggest, Mr. Gotsch?

MR. GOTSCH: Does the Respondent dispute the fact of these particular Citations that there is about six non-serious violations? Is there any dispute of the facts of these Citations?

MR. KIMBALL: Of course there is. What I am saying is I can concede if this witness were examined in excruciating detail over the next two hours, ultimately he would testify that he did observe the things as recited in the Citation. I think it is unnecessary to put us all through that procedure. That is a far cry from saying that I agree that he saw these things, but I am resigned to the fact that ultimately he is going to testify that he

did see them. I concede that he will testify that he did see them.

MR. GOTSCH: Well, your Honor, I think we have no choice but to continue on with the presentation of the evidence in support of the Citation and the complaint.

JUDGE CHODES: You may proceed.

RE-DIRECT EXAMINATION BY MR. GOTSCH

Q With respect to your inspection, did you recommend that a Citation be issued? Could you describe for the Court your observations which led you to recommend that this Citation be issued?

A On the North side of 39th Street shed area, there are two ladders which are protected by gauge metalwork, ten feet above the ground and rising to the roof of the structure and they had previously been struck and mangled rungs broken and rails bent.

Q When you say they had previously been struck, what had been struck?

A The ladders, wire attached to the side of the building. Unless one of the sheds, one of the ladders that was about twenty three feet up to the upper structural works, leading to one of the control

boxes, was not secured and someone climbing it, it could shift laterally several feet.

Q This was a fixed ladder, Mr. D. Martino?

A They were both fixed ladders, one fitting through a manhole.

Q What was the hazard that you perceived with respect to these conditions?

A That in the event someone was inclined to climb one of these ladders it would be very difficult and they would fall off, depending how much height he gained and could be killed and maimed. I advised Mr. Chiplock of the condition and he said, "okay" and I said "okay , take them out of service or make them inaccessible to employees."

Q Where did these ladders lead to?

A They led to the roof of the 39th Street shed area where vents or equipment could be serviced.

Q Did you question Mr. Chiplock as to the use of these ladders?

A Yes, we discussed this. He said nobody will go up there, but they were still available and he agreed to post them or take them out of service or repair them.

JUDGE CHODES: They were not being used?

WITNESS: There was no one using them at the time.

Q You note the caged ladder on the North side of 39 and lower 10 feet of rungs that were bent and broken. Where did this ladder lead and did you make any observation of the upper area?

MR. KIMBALL: I object to this. It is repetitious, and not only does it say on the Citation or access to the shed roof, the witness has now twice testified that it went to the roof.

JUDGE CHODES: Well, I will allow you to continue. Sometimes the repetition is necessary.

WITNESS: For the first 10 feet from the ground up to the start of the cage protected portion, the rungs were broken and bent and then the ladder from thereon to the roof was protected by the cage metalwork, and around the remaining portion of the ladder, that leads to the roof.

Q And the other ladder you described, could you be more specific about the condition of that ladder?

A The second ladder, the caged area was bent and it would have been difficult for a man to gain passage through the cage protected portion of the ladder which was above the 10 feet from the floor.

Q Where was the ladder located, sir?

A This was from the North South -- it would be the East end, about 45 to 50 feet from the North ladder.

Q Did these ladders both lead to the same place?

A Yes, sir.

Q Were there any other access to that area?

MR. KIMBALL: Objection. The witness has testified that they were never used by anybody.

JUDGE CHODES: He never testified to that. You may continue.

Q Were there any other means of access besides these two ladders?

A None that I could see outside of the building that we were looking at.

Q Mr. D. Martino, did you discuss with Mr. Chiplock the ownership of these particular ladders? Let me rephrase that. Did you have any discussion as to

whose responsibilities these ladders were?

MR. KIMBALL: Objection. This is calling for an unauthorized opinion and conclusion as well as hearsay. Whose responsibility?

JUDGE CHODES: I will allow the question.

WITNESS: As far as the responsibility, Mr. Chiplock said the maintenance people were the only ones who could use the ladder to make repairs. As to who owned them, I don't think we discussed that at all as far as ownership.

CONTINUED EXAMINATION BY MR. GOTSCH

Q When you said he told you that maintenance people might use them to make repairs, who would these employees be employed by?

JUDGE CHODES: Do you know the people he was referring to?

WITNESS: I know as the result of the closing conference I can say, yes, the maintenance people from the maintenance department of the Northeast Terminal.

Q You stated you had a discussion of this at the closing conference?

A We discussed the ladder where we were standing looking at them.

Q What was the basis of your recommending that this Citation be issued to Northeast Terminal Company as opposed to any other possible employer?

A During our closing conference we separated Stevedore operations and Terminal operations. This fell into the category of Terminal operation and therefore was laid to the Terminal.

Q Did you recommend that a penalty be proposed for this particular condition?

MR. KIMBALL: I concede that and concede that it wound up in a penalty of 50 bucks.

MR. GOTSCH: I believe I have to side with the penalty. I take into consideration the confession of the Respondent.

Q Mr. D. Martino, did you recommend that a proposed penalty be issued to the particular item?

MR. KIMBALL: Your Honor, we are not here before you to contest the amount of any of these non-serious repeat penalties.

JUDGE CHODES: I appreciate that, but, it is my duty to assess penalties. I could assess

it for more than \$50 if I were so inclined. The point is I do have to have some basis for an assessment. One of the bases of the fact is that you are not contesting it. I would like to hear some testimony on that subject.

MR. KIMBALL: Is the Government seeking to increase the amount of any of these penalties?

JUDGE CHODES: I doubt it.

MR. KIMBALL: I am not yelling they should be less. What is there to decide? Isn't it your Honor's function to decide controversies and not abstract questions? The Government doesn't want more and I am not yelling for less. I submit that you are being --

JUDGE CHODES: I am following the Commission's ruling. You may continue.

CONTINUED EXAMINATION BY MR. GOTSCHE

Q Did you recommend a proposed penalty for this particular item?

A Yes.

Q Could you tell me what the unadjusted penalty was?

A The unadjusted penalty was \$1015.

Q How did you arrive at that unadjusted penalty, sir?

What factors did you consider?

A On good faith the fact that he was going to take out of service and take them down, that would eliminate the problem totally and the size of the company where no deductions were allowed. On the fact that serious injuries and in the b category where Doctor treatment could be required, the amount of exposure which was minimal. It was only two ladders out of a possible ten there are on the other buildings. These are the only two that were hazardous. The fact that nobody was on, near or around them and no intent was indicated that any work would be going on in the immediate near future. The good faith, size, and history, the fact is that deduction was allowed, which reduced the penalty to \$50.

Q How much credit was given for good faith, size and history?

A Ten percent.

Q Would that hold true with all of the non-serious violations?

A Yes, sir.

Q Where did you arrive at a total of 10 percent as

opposed to some other factor?

A The overall inspection, the general work site, the amount of penalty, the previous history of OSHA inspections, the fact that we have to go over the entire complex, the knowledge that OSHA inspection was in progress and the failure to abate conditions before we got there or ahead of the inspection team. Ten percent for good faith rather than none.

Q What is?

A Rather than nothing for good faith because immediate action was taken on conditions that we did come across.

Q What about size, sir?

A On size, there is no credit given because of the amount of employees.

Q What about the factor of history?

A Again, the history generally for the past performance of the company, totally, showed something like 35 or 40 violations over the past two years, and on history, it wasn't justified to give anything off.

Q Were there any other credits given?

A No, sir.

Q Was anything permitted for abatement?

A The automatic 50 percent abatement which is built into the system and the 10 percent allowed during the inspection.

MR. GOTSCH: I have no further questions with respect to the item, your Honor.

RE-CROSS EXAMINATION BY MR. KIMBALL:

Q The shed where these ladders are located, is that the same shed where number 19 high-low, unauthorized ride was located?

A Yes, sir.

Q You spoke of an inspection team and conditions "we came across". Who is on the team and who is we?

A Mr. Chiplock, Mr. Ciccone and myself.

Q That is the team?

A Yes, sir.

MR. KIMBALL: I have no further questions about this framed violation.

RE-DIRECT EXAMINATION BY MR. GOTSCH

Q Mr. D. Martino, you recommended that the Respondent be cited for an alleged violation of 29 cmh1910a1. Could you describe the conditions that led you to make this recommendation, sir?

A On visit to the storeroom, garage and the rear of the garage area and building 111a, this is

a housekeeping violation and in all these areas there was enormous accumulation of materials to tools, parts, liquid, paints, unguarded machines, they were cited under other sections, but their housekeeping was for all the areas and upon notification of the conditions, Mr. Chiplock ordered the areas cleared immediately during the inspection.

Q How many of these areas did you identify?

A Well, at least they were separate areas that we made notes of the storeroom. The storeroom approach was near llla building and the garage area.

Q Could you indicate the hazard you perceived as a result of this alleged violation?

A Well, in one area, in the garage area, there was a stop log up against the wall area which made it hazardous in order to gain access to the material and parts wreck and in order to get to it, you have to climb over debris, pieces of metal wire and which were stored between the stop log area and shelf area and the mechanic sought of cleared the area at that time. As a result of that, the men could have been struck on his head and laid there

and nobody would know it and would not be found there that day or the next day. It was an isolated area from the garage and a general work area.

Q What about some of the other areas?

A In the one, in the maintenance area, there is an excess of amount of material to what the room could hold and the material was stored at in the wall area, and in the center area and no aisles of passage were available. Rear of the area of the storeroom was being used for stores of metal parts and equipment and blocked the access from the telephone room down the ladder way and a means out. That area was also extremely hazardous.

Q How many employees were working in that area?

A Well, nobody is particularly working in the area, but there is passage continuously during the day in the area and as far as the escape route, it was the only means of escape for the telephone people located in the upper room.

Q Which building was that?

A The stores in llla building. All the areas were cleared before we left the inspection site.

Q You mentioned people, the telephone room in the

building 111a?

A That would be like a ladder way up, like a first flight.

Q Are you referring to a stairway, a stairwell?

A This would be the only means of access.

Q What was the condition of the passageway that these employees would have to walk?

A It would mean going out of the door and then down the ladder but then that is as far as they could get out, being able to escape without climbing over the materials blocking the ladder for about six feet up, which was all around the ladder and in front of it and on the curb steps, which was about three and a half to four feet that the ladder rested on or was built on.

Q How many employees, if you know, were located in this particular building?

A Well, I don't know how many people worked in the building per se, but the one particular person that was in the telephone room is there through separate shifts. One person I did see and the others would be at the lower dock area, but they didn't have particular fire problems except for the two, three people that are in the storeroom workshop area

that would use the rear access area there.

Q You mentioned something about the machinery repair area?

A That would be the garage area where parts and equipment are left without definitive aisles.

Q How many employees work in the area?

A Well, there are three mechanics and depending on the conditions prevailing neither one would be in or sometimes 41, depending on the work being done at the time they were due in there.

Q Did you discuss these observations with Mr. Chiplock?

A He was present as was the garage foreman and they started an abatement for immediately cleaning the area and getting rid of the debris and the hauling all the junk away from the hallways and picking up.

Q Can you identify the employees involved, not by name, but by employer?

A I didn't ask them if they worked for the Terminal or for the Stevedore, but it was my understanding--

MR. KIMBALL: I move to strike -- all right, continue.

JUDGE CHODES: How did you know?

MR. KIMBALL: I move to strike. I object to the question. It assumes he knows something that he doesn't know.

CONTINUED EXAMINATION BY MR. GOTSCH

Q How did you make a determination to cite Northeast Terminal or this particular Marine Terminal for the particular violation?

A This was during the closing conference when this was considered a Terminal operation being that no ship was working and the Terminal was working to repair equipment so as to become a Terminal violation and was laid there.

Q With respect to the proposed penalties for the item, what was the unadjusted penalty that you proposed in this matter?

A \$1050, and the same credits were allowed with the automatic 50 percent abatement with a resultant adjusted penalty of \$65.

Q Hold on just a second. Let me get to the reason you started with \$150 as an unadjusted penalty? What were the factors that started at a figure of \$150?

A The factor is that so many areas were in need of housekeeping attention. Too, the exposure to employees in there were forced to work in the area without being freely able to move away from the areas at will and there was a risk of being injured as long as they were at the work site continuously without relief during that day.

Q Did you inform anyone of the possibilities of injury to any employees?

A All the sites there were serious and could have resulted in the garage area- and a man could have fallen and struck his head on metal and would and could not have been found. In the event of fire, the means of access was blocked. During the day, the men gaining access to the rear of that storeroom which they use as a general passageway, they could trip or fall in the area which was slippery and from all grease and stuff of equipment was still laying there, and as a result of the injuries that could occur continuously during the day, but I thought it was a fair assessment for the amount of exposure.

MR. GOTSCH: I have no further questions

on this particular item.

CROSS EXAMINATION BY MR. KIMBALL

Q Do you know who owns or leases any of the areas?

JUDGE CHODES: I think he answered that.

The answer is no?

WITNESS: Yes, sir.

Q You said there was no ship working? Don't you remember going aboard the Yugoslav ship?

A There was one that arrived when I was leaving. I don't remember any of the other because I didn't make a note of it.

Q Without regard whether you made any note or not, do you remember going aboard the ship with Chiplock during the inspection on the 3rd and 4th?

A No, sir.

Q You don't remember that?

A No, sir.

Q If you had gone aboard a ship that would have changed the entire basis upon which you allocated these Citations to Terminal; would it not?

A No, sir.

Q I thought you said because a ship was not working?

A You want an answer? I said no, sir.

JUDGE CHODES: No, don't argue.

Q Didn't you say when it came to the allocation it was determined that these things belong to the Terminal because no ship was working?

A That is correct.

Q I ask again, you have no record or memory of any Yugoslav ship working on April 2 or 4, 1974 at these premises which you called 39th Street Terminal?

A I did not make a notation of any vessel working and I don't remember if I went aboard a vessel or not. I did not cite any vessel violation that day.

Q Do you also cite them, always cite them? Is that the way you figure it? When you go aboard, there is going to be a Citation no matter what?

A I go from the record that I have in front of me. When I don't see a

Q Is it conceivable you went aboard a Yugoslav ship and didn't issue a Citation because you didn't find anything to cite?

A We do that often.

Q If that happens you would have no record of that, would you? You would have no record, would you?

A Yes, if that is all I did.

MR. KIMBALL: I have no further questions on this Citation.

(Judge Chodes called a luncheon period from 12:35 to 1:35)

RE DIRECT EXAMINATION BY MR. GOTSCH

Q We were discussing the alleged non serious violation and as a result of the inspection you cited Respondent for violation of 29 CFR 1910.213h1, and I would like your observations which led you to recommend that Citation?

A That was the unguarded saw blade in Building Number 111a and there were four men in the shop at that time and there was a regular arm saw in a fixed position located against the wall and there was sawdust around the area that didn't indicate recent use. I questioned the people in the shop. The foreman stated that the saw belonged to his son.

MR. KIMBALL: I move to strike that.

JUDGE CHODES: Who told you that?

WITNESS: The foreman.

JUDGE CHODES: What did he say?

WITNESS: He said the saw wasn't his.

JUDGE CHODES: There is an objection on that? Well, what is the basis for your objection, Mr. Kimball?

MR. KIMBALL: Not responsive to the question. You know these admissions, none of them are binding on my client. Not every jackass is capable of making an admission.

JUDGE CHODES: I will admit it. It may be his say for what it is worth.

MR. KIMBALL: The fellow said it belonged to his son.

WITNESS: The saw belonged to his son. I looked to Mr. Chiplock and asked him if he knew anything about it and he said apparently that it belonged to his son, "we'll take it out". I checked it and saw the saw was hooked up ready for use and I asked who had the key and the forman indicated that he had it in his pocket. I advised Mr. Chiplock to tell the guy to pull the plug, put the saw out of commission, deactivate it, and we considered it a condition abated.

Q Mr. D. Martino, what hazard did you receive as a result of this particular violation?

A That the area was also cited for poor house keeping and in one of the areas there was no defined walkways for passage because there was an excessive amount of stored material in a small space and the amount of people in the area and the saw : could have been used anytime and someone could have lost a finger or from a project tile flown across a short space. I assessed the people \$150.

Q What was the amount of the penalty?

A \$150.

Q What factors led you to cite an unadjusted penalty?

A The man would have been cited seriously which would have been a \$1000 penalty and in this case no one was using it at the time, although it was available for use and the responsible person in the place had the key in his pocket and I would have to assume that he would not let the right person use it. I didn't know if his son owned it or not. I was not going to conduct an investigation for finding the son. The fact that the saw was in the employer's premises was enough, plus the fact that he said they had been using it there.

JUDGE CHODES: Who said that?

WITNESS: It was obvious. The forman said the son had been using it.

JUDGE CHODES: Was his son an employee?

WITNESS: I did not inquire.

So, on the basis of that factor and of the automatic 50% abatement and 10% allowed for size and good faith and past history, the 10% was deducted with a resultant adjusted penalty of \$65.

Q Other than the operator, did you perceive any hazard to other employees in that work place?

A Obviously. The people in the room and the place already cited for housekeeping.

Q For the other employees working in that room, what hazard were they exposed to even if they, assuming the machinery wasn't operated, but they weren't the operator?

MR. KIMBALL: Objection. Let us not bring up hypothetical things in dredging up horrors too bizarre to merit the dignity of your Honor's attention.

JUDGE CHODES: I will allow the question.

Q What was the potential exposure to the other

employees?

A The machine could have struck someone, punctured his body or stuck him in the eye or head.

MR. KIMBALL: Don't forget his teeth or eyes. Excuse me, your Honor.

Q Mr. D. Martino, what led you to cite Northeast Terminal, Marine Terminal for this particular citation?

A During our closing conference and mutual agreement of separating the Terminal and the Stevedore operation, the condition of the saw in the garage would be more maintenance and repair and the structural building usage and is strictly a maintenance operation that was listed of the Terminal.

Q Who did you discuss this with to make that determination?

A Mr. Chiplock and I discussed this during our closing conference and we went through all of the 26, 27 items, whatever they were and made these separations and determinations.

Q Speaking of this at the time of the closing conference, were you aware that two corporations were

involved at this particular job site.

A No, I made a separate OSHA number one and provided a separate number which Mr. Chiplock was able to secure for me. I believe, through Mr. Viola and separate OSHA one

MR. GOTSCH: I have no further questions.

RE CROSS EXAMINATION BY MR. KIMBALL:

Q Would you explain to me how it is possible to make a mutual agreement that somebody violated OSHA? Otherwise stated, how would you like to agree with me now that Judge Chodes has violated all of these things and walk out of here a free man?

JUDGE CHODES: Mr. Kimball, this is argumentative and I don't think it is a proper question.

CONTINUED EXAMINATION BY MR. KIMBALL

Q What do you mean you used your mutual agreement?

A On who violated which act or standard, whether it was a Stevedore operating procedure or a Terminal operating procedure and on the advice of Mr. Chiplock, we made a determination, of which

Q Did you just have reference to the fact that

following inspection which you made April 3rd and 4th of 1974 you caused Citations and proposed penalties to be issued to Northeast Stevedoring Company?

A I don't understand your question, sir.

Q The fellow who made the inspection at the Foot of 39th Street on April 3 and 4, 1974, that resulted in the issuance of a Citation, dated April 15, 1974, to Northeast Stevedoring?

A Yes, sir.

Q The issuance of a proposed penalty bearing same date of April 15, 1974?

A The same inspection, yes, sir.

Q There are about 14 or 15 of those; is that what recall?

A Yes, sir.

Q So when you say mutual agreement, you meant you and so and so mutually agreed that certain of those violations would be charged against the Stevedoring Company and certain would be charged against the Terminal Company; is that right?

A Not someone. Mr. Chiplock, the Safety Director who is acting as a Management Representative for both company's closing conference and an abatement procedure.

Q Did he have a neon sign saying that he was acting as a representative of both companies?

A That and the authority exercised during the procedure, yes, sir.

Q He said he was doing this?

A Yes, sir.

Q As the result of that allocation various Citations and proposed penalties were issued to the Stevedoring Company on April 15 and the balance were issued to the Terminal Company on May 14; is that right?

A That is my understanding, yes, sir. To enlighten you -

Q I don't need to be enlightened.

If I understand correctly, you caused a Citation to be issued to the Terminal Company or laid one off on the Terminal Company because in shed 11a, the owner of which you do not know the lessee, and of which you do not know in that shed, you found a saw which somebody said belonged to his son and you do not know whether or not the son was then ever or will ever be an employee of either the Terminal Company or the Stevedoring Company; is that right?

A I don't know who the son works for.

Q But you don't know who the saw belongs to except for the hearsay so the saw belonged to Mr. Chiplock's employee. I thought you didn't know the son was employed or not?

A I have no idea. The father told me the son was going to take the saw home.

Q You don't know if he brought the saw there to use?

A I don't know who brought the saw in.

Q You don't know when?

A No.

Q You don't know where it was brought to as to whether the shed belonged to the City, the Port Authority, the Terminals, Stevedoring or who?

A I was taken into the work site that was controlled by Mr. Chiplock's employer and if it was not Mr. Chiplock's employer, it would have been incumbent upon Mr. Chiplock to advise me that this is not part of our area.

Q When did you make that determination it would be incumbent upon Mr. Chiplock?

A Right now.

Q Did you have the foresight to publish that or cause it to be published in the Federal Register so the

rest of us could know?

JUDGE CHODES: Let us not become ludicrous. Ask questions and try to get responsive answers. Ask questions that are relevant in this case.

CONTINUED EXAMINATION BY MR. KIMBALL

Q A perceptive fellow like you, you have been doing this work for three years?

A Twenty eight years.

Q Did you by any chance observe any portion of these premises under construction?

A Yes, sir.

Q Tell me, as an Ocean Inspector, when you go to premises, do you hold those premises to the same standard of performance as a fully completed structure?

A Higher.

Q So, in other words, if I am building a brick building and I only have gotten this high (indicating) and there is a hole in the wall, you give me a Citation because there is a hole in the wall on account of because they haven't done it yet?

MR. GOTSCH: I object to this question because it is irrelevant.

JUDGE CHODES: I think it is irrelevant.

We can go far afield for this type of question.

You indicate that you wanted to finish today,

so let us try to keep the questioning pertinent.

Q What allowance did you make for the fact that last portions of those premises are still under construction?

A The areas that were under active construction were not even looked at and that was the North area of the pier where active construction was in progress on a crane.

Q Do you know what effect, if any, the active construction that the North end of the premises had upon the conditions which you observed toward the South end of the premises?

A None whatsoever.

Q You made no allowance for the effect of such changes because you said yourself that they had no effect at all?

A I didn't even approach the area because it was a work site and I did notice there were outside vehicles unrecognizable to me, outside workmen.

Q Where, for example, did any of these unused parts

which you found in the South end of the premises -- were they any byproducts of construction at the North end of the premises? You don't know because you didn't make any effort to find out?

A I know what the South end was in relation to the North end because the South end was a new garage structure and the entire complex machinery would be held in that complex. Whether they use it in the North, East, South, or West end, I didn't look at the North end. It had no relationship to the construction or activity going on in the complex that was inspected.

Q The Yugoslav ship was North or South, if you remember?

A At the South end.

MR. KIMBALL: I have nothing else.

Thank you.

CONTINUED RE DIRECT EXAMINATION BY MR. GOTSCH

Q Going onto further items of this Citation, you cited Respondent for alleged violation of 29 CFR 1918.25e and I would like you to describe this?

MR. KIMBALL: I have 1910. Is that an error. I have no objection if you want to change it.

Martino Re Direct

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MR. GOTSCH: It should be 1918. I corrected it in the plaint. I see the Citation did say 1910. I would move the Citation to conform to the Complaint and to the evidence that will be presented.

MR. KIMBALL: I have no objection to it, your Honor.

JUDGE CHODES: Amendment is granted.

CONTINUED EXAMINATION BY MR. GOTSCH

Q Could you describe this condition for the Court, please?

A It was in the new construction garage shed and inside the shed a jumbo high low was supporting the listing frame on which there was an eye beam and a man was on the eye beam and they were attempting to locate it and in an approximate position overhead, on the West wall, about 15 feet up there was a block house, about 10 by 8 feet and about 8 feet high, and a ladder was between the block house and the edge. On top of the block house a man was working. The ladder was several inches short of the top of the block house and was unsecured and not blocked to prevent

it from falling or sloping. While speaking with Mr. Magna, I advised him of the situation and he took steps to correct it immediately, lowering everybody to the ground and the man on the top of the block house. While he was discussing this situation he was on all fours on top of the block house and reaching for the ladder. He made his way down and we told him to bring the ladder down the rest of the way so nobody else could use it. The result of this

Q Let me take this a little further. Here we are discussing 1918.25e. Now what was the hazard that employees were exposed to due to this condition that you described?

A The fact is that the man could have fallen on to the platform level which was about 8 feet from the top of the block house or fallen the rest of the 18 feet down to the concrete deck or fallen on Mr. Magna who was below or other workmen who were working in the area or passing through the shed North or South, and beside killing himself, he could have gotten somebody else killed.

Q You stated you saw Mr. Magna at this time?

A He was supervising and directing the operation.

Q Which operation?

A Of placing or locating the 20, 25 foot 'eye'-beam. He wasn't particularly directing the man on the ladder, but the operation of the eye-beam for locating it, for the overhead area.

Q Did you discuss this matter with Mr. Magala?

A Yes, sir.

Q What was the substance of that discussion?

A The result of that was the condition was abated and I think we discussed Mr. Chiplock at that time and it was a serious violation.

Q Which was a serious violation?

A The jumbo high low supporting the frame and lifting the frame on to the top of which was the 25 foot eye-beam with a man hanging on the South third of the beam without any protection afforded to him in the event that he fell.

Q You stated this was a serious violation. Did you cite for this particular alleged condition?

A It was a non-serious violation and through the discussions with the office and during the review, the Area Director suggested that it isn't clear cut and explained the Terminal and Stevedoring

concept. Also, there was no determination made as to who the man on the beam was or one on the top of the block house was and the Area Director advised that I get back to the area and cite them for a serious violation upon discovery of who the employee was and make a proper contact and do so and, due to the fact that I was assigned to a fatality within a day or within completing the writing of the report and during that review period, I was unable to get back to the Terminal to continue any further investigation.

JUDGE CHODES: You issued no Citation?

WITNESS: Not on that particular thing,
no, sir.

Q With respect to the short ladder situation that you observed, did you prepare a penalty for this particular ladder?

A Yes, sir. The penalty was proposed for the ladder in the amount of \$200.

Q What were some of the factors that led you to that figure of \$200? What was the proposed penalty for this particular item?

A With the automatic 50% abatement and an allowable

10% for good faith, size and history, the penalty adjusted to \$90.

MR. GOTSCH: I have no further questions.

RE CROSS EXAMINATION BY MR. KIMBALL

Q I understand you dropped a serious violation because you couldn't tell who had done it?

A Not because I couldn't get back to the area to continue investigation.

Q The reason that you had to continue the investigation was to find out who was responsible for the serious violation; is that right?

A Who the people involved were.

Q So that you could figure out who to cite; is that correct?

A Whether to cite a third party beside the Terminal and the Stevedore.

Q You didn't wind up citing the Terminal or the Stevedore?

A Because the determination was not made at the time.

Q The same area involving the same people you caused a 1918.25e non serious violation citation to be issued; is that right?

A On the determination of the Area Director, whatever Citations were allowed were cited.

Q Let us see. You know how to answer questions straight, don't you? If I asked your name, you would tell me it, wouldn't you?

Did the serious violation and the non serious violation for which a Citation was issued occur in the same area?

A Yes, sir.

Q Were the same people involved in the serious violation and the non serious violation? Were these various workmen about the same people?

A Yes, sir.

Q When did you finish your report? A date?

A I got my report in on the 10th.

Q Of what?

A April.

Q 1974?

A Yes, sir.

Q When was the review period completed?

A I have no idea.

MR. KIMBALL: I have no further questions.

RE DIRECT EXAMINATION BY MR. GOTSCH

Q Just one or two questions on this particular

point.

- Q Mr. D. Martino, you stated you prepared your report on the 10th or 11th of April?

MR. KIMBALL: Objection. Completed.

A Already completed.

- Q At the time did it include the serious violation you previously testified to?

A Yes, sir.

- Q Did you discuss these items, including the serious violation with your Area Director?

A Yes, sir.

- Q Did he accept the Citation as you proposed it?

A He felt it was not enough information in it and requested me to request to cite as soon as possible to determine who the employees were and whoever was involved to make a more clear determination.

- Q Were you able to make this clearer determination?

MR. KIMBALL: This has already been covered on direct. Objection.

JUDGE CHODES: No harm in the question.

Go ahead.

- Q Were you able to make this determination as to the employees involved?

A I was not.

Q Why was that, sir?

A Because I was assigned an investigation and another one within four days after that one and I was busy enough.

Q Do you recall the employers involved in these?

MR. KIMBALL: Objection.

JUDGE CHODES: It is not necessary to go into that.

WITNESS: I have a date, if it does any good.

Q Therefore, did the Citation as finally issued include the serious item that you discussed?

A No, because I did not get back to the Area Director to discuss it and because I had no information on his request. So, they decided to send them out to where they were without the Citation because I failed to complete it.

MR. GOTSCH: I have no further questions on that item, your Honor.

MR. KIMBALL: I have nothing more, your Honor.

MR. GOTSCH: The 5th item is of a non serious violation and pertaining to 29 CFR1918.25f.

Could you describe your observations with regard to this alleged violation, Mr. D. Martino?

A Well, everything that pertained to the violation in regard to my previous testimony is the same except for the fact that another standard, 191825f designates that the ladder was not secure.

Q Where was the ladder located?

MR. KIMBALL: I believe he found a condition which in his opinion constituted the violation of two sections of the law. So we have heard about the location of the ladder and everything else. This is redundant testimony.

JUDGE CHODES: Was it the same ladder?

WITNESS: Yes, sir.

JUDGE CHODES: Sustained.

CONTINUED EXAMINATION BY MR. GOTSCH

Q What was the hazard that you perceive with respect to this Citation?

A That when the employee attempted to come down he was fortunate if the ladder would not slip down from under him and if he wasn't stopped. He would fall down and possibly strike another employee or

injure himself seriously or kill himself.

Q What type of ladder was this?

A It was a wooden ladder.

Q Was it a fixed ladder?

A No, sir. It was a portable, wooden ladder with wooden rails and round rungs.

Q Did you propose a penalty for this particular item, Mr. D. Martino?

A We proposed a penalty of \$150 and with an allowable 15% abatement and 10% built in for good faith, size and history. A proposed penalty of \$50 was submitted.

MR. GOTSCH: I have no further questions.

MR. KIMBALL: I won't repeat the cross examination in respect of this. I have no cross examination with respect to 25.

CONTINUED DIRECT EXAMINATION BY MR. GOTSCH

Q One final item on the non-serious Citation which you recommended. Could you describe for the Court your observations with respect to your alleged violation of 29 CFR1910.106e.24b?

A In the garage, the forman we questioned about the method of cleaning machine parts and that they usually cleaned them with gasoline of

which there were 2/3 full cans uncovered and there are about 30 pieces of machine parts spread out on the floor, dripping that had previously been cleaned, gasoline vapors, and there were 5 men working at the shop at the time and this particular area was within a caged area for security with a blocked means egress; and there was no method of disposing of the liquid for it was kept in covered cans or containers.

Q What was the hazard that you perceived as a result of this condition?

A Any number of sources. The area was not posted for not smoking and people were smoking. The area was blocked for egress and the machines drove out of the area and could have effectively ignited the fumes. There was activity going on around the shop area where metal was struck on metal and a spark could have effectively ignited the area and an explosion could have ensued or a serious fire. Death and serious injury could occur. There was a discussion with Mr. Chiplock about providing a high flash type of cleaner and I don't know if this was followed up, but we haven't gone back to check it.

Q Mr. D. Martino, did you propose a penalty for this particular item?

A There was a proposed penalty of \$230.

Q What factor led you to that amount?

A Probability of death and high probability of ignition and the high probability of easy means of egress.

Q When you said the high probability of easy means of egress, what do you mean?

A Anybody called in the area would have to make his way out of the floor area which could have been ignited and caused an obstacle course to be ignited.

Q What were the dimensions of these parts?

A Transmissions, size, largest.

Q Transmission size?

A A foot, 18 inches by 3 foot and assorted gears and assemblies of a transmission.

Q What was the penalty that was assessed for this particular item?

A The adjusted penalty was \$100.

Q Did you have any discussion with Mr. Chiplock as to the designation of the violation as pertained to Northeast Terminal?

A Again, during our closing conference, because this equipment was being readied by Marine Terminal to be made available to the Stevedore and this was a Terminal repair operation, and, therefore, to be laid on the Terminal side.

Q Mr. D. Martino, with respect to the closing conference, who was present at the closing conference?

A Mr. Chiplock, the Shop Steward in and out on one occasion, but not actively participating, only to come into the room, use a phone and leave again and at one time, there was a closed conference with Mr. Magna in Mr. Magna's office when I went after certification for the crane that was newly installed. It was in the record, and order to complete the inspection in two areas and I was advised to see Mr. Magna for this because Mr. Chiplock didn't have it available in his office and when I was in touch with Mr. Chiplock in his office, we checked the area there to complete inspection of the work site and I advised him of a few conditions that were in his work area and no Citations were issued. Men were working through the place and there was no consideration of any Citation being issued.

Fire extinguishers were slated to be hung and they were aware of the condition and work was in progress.

Q With respect to this particular Citation, seven items were cited. Were these all discussed with Mr. Chiplock, the seven items that concern us there?

A They were discussed in conjunction with the others which were separated for the Stevedores, yes, sir.

Q Were you aware that two corporations were involved when you first arrived at the job site on April 3rd?

A No, sir. I was concerned with just doing the inspection of the Northeast end to my knowledge Northeast has also been the Stevedore, because I was always involved with Stevedores and this is what I was doing. I thought I was doing an inspection of the Northeast Stevedore.

Q When did you learn that a second corporation was involved?

A Initially when we were discussing the condition in the newly constructed garage where Mr. Magna was in charge of an operation and in that area and

later with the closing conference when we separated the two citable conditions and citable companies.

Q Who provided you with the information that the two corporations were involved?

A Mr. Chiplock was instrumental in securing the two separate and distinct Federal reporting numbers, I guess you call them, and both were recorded and both noted.

Q Did you advise Mr. Chiplock as to the seven items that a Citation was possible?

MR. KIMBALL: Immaterial, objected to.

JUDGE CHODES: Let him answer.

WITNESS: I do not believe and I am certain there were no misunderstanding regarding the fact that Citations were being issued.

MR. KIMBALL: I move to strike that as not responsive. The witness has now gotten into a mindreading and psychotherapy which is unqualified information.

JUDGE CHODES: I will let the answer stand.

Q Have you ever met with Mr. Chiplock at any time prior to the inspection on April 3rd?

A There was an inspection at the same complex in July of 1973 at which time Mr. Chiplock and a delegate or Shop Steward hailed a special inspection in regard to the hard hat violations and I advised them they will be cited unless the condition was abated immediately and the delegate of ILA came to the pier.

Q Aside from that, what was your understanding of Mr. Chiplock's role at that time?

MR. KIMBALL: Objection to his understanding. It is immaterial.

JUDGE CHODES: Rephrase the question.

Q Did you make any determination as to Mr. Chiplock's job at that time?

MR. KIMBALL: Objection. Immaterial.

JUDGE CHODES: Did you make a determination or did you not?

WITNESS: Yes, I made a determination.

Q What was Mr. Chiplock's job?

JUDGE CHODES: Ask him what it was based on?

Q What was the determination based on?

A That Mr. Chiplock was the representative of the

employer and that he was the Safety Director and the Coordinator for the complex.

Q How did you arrive at that determination? How did you learn that?

A He told me he was a Safety Director.

JUDGE CHODES: Mr. Chiplock told you that?

WITNESS: Yes, sir.

Q Did he mention any corporate names at that time? What was the occasion?

A We didn't go into any names.

Q When he said he was Safety Director, Safety Director of what?

A He didn't say. You know, to go into the whole spiel of Northeast Stevedore. Just a Safety Director. I knew I was at Northeast Stevedore Complex.

MR. GOTSCH: I have no further questions, your Honor.

RE-CROSS EXAMINATION BY MR. KIMBALL

Q You learned in 1973 that Mr. Chiplock was Safety Director of Northeast?

A When did I know officially?

Q I don't know if you know officially. You testified

in answer to the Government's painstakingly phrased questions that in 1973 you met Mr. Chiplock and at that time he indicated to you that he was the Safety Director of the Northeast Stevedoring; isn't that what you just told the Government?

A I said he was the Safety Director. I didn't say he was the Safety Director of any place.

Q You told the Government you knew. When he said he was the Safety Director, you put one and one together and you made him a Safety Director of Northeast Stevedore; is that right?

A If you say so.

Q When you dealt with him in April, 1974, you believed you were dealing with him in the same capacity, namely as Safety Director of Northeast Stevedore?

A Yes, sir.

Q When was the closing conference at which you discussed the seven Citations which you laid off on the terminal? What was the date of that closing conference?

A April 5.

Q You already told me this and I neglected this, and I apologize for asking again the dates when

you completed your report?

A Ten, eleventh of April, 1974.

Q You say the 10th and 11th. Does that mean on the 10th the reports were completed with respect to the one set of Citations and the 11th you completed your reports with respect to the other set? When did you first receive the Stevedore's or Terminal--

A I submitted them for review.

Q They were finished as far as your handwriting was concerned?

A Yes.

Q You have done everything that you could to up the review?

A Right.

Q By April 10 in respect to the Stevedoring and April 11 in respect to the Terminal; is that correct?

A Correct.

MR. KIMBALL: I have nothing else, your Honor.

MR. GOTSCH: I have no further questions for Mr. D. Martino.

The witness left the stand at 2:25 P.M.

MR. KIMBALL: I would like to point out that the Government has not given us any notice that they would call any other witnesses in response to your Honor's direction. The Government I should say -- this is in tarried response to Goverment's direction and the Government says the Complainant will call only one witness in its direct case which was the Compliance Officer, Mr. D. Martino. I don't expect to hear anybody else testify on direct.

JUDGE CHODES: Mr. Gotsch, what do you have to say about that?

MR. GOTSCH: We had a discussion of the Citation issued in 1972 which I wanted to introduce into evidence and apparently I was mistaken in my belief that Mr. D. Martino had enough information. And that was the purpose for bringing in Mr. De Archangel.

JUDGE CHODES: I don't think the Respondent will be prejudiced by this witness. He will be used to testify to something that was alleged in the pleading. I will allow the witness to testify.

Martino

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MR. KIMBALL: Is he going to identify this as a record made in the regular course of business?

MR. GOTSCH: That is what we are going to testify to.

MR. KIMBALL: If he got on the stand that is what he was so testified to?

MR. GOTSCH: That this is a final order of the Review Commission.

MR. KIMBALL: Is that what he will testify to?

I will concede that is what he will testify to if that is why he is called in as a witness.

MR. GOTSCH: I will offer this in evidence.

MR. KIMBALL: On the basis of what we stipulated, Mr. D. Martino would testify if he were called as a witness, I have no basis for an objection.

JUDGE CHODES: You mean Mr. DeArchangel?

MR. KIMBALL: I assume, your Honor, is receiving it in respect to only one item. I think that is number five.

MR. GOTSCH: It bears on the repeated one of the --

JUDGE CHODES: It will be admitted into evidence and marked Exhibit C1.

(The above mentioned document was there-upon marked as admitted into evidence and marked Exhibit C1, this date.)

MR. GOTSCH: I have nothing further, although perhaps the rebuttal witness if it becomes necessary.

JUDGE CHODES: Well, then, we can proceed.

MR. GOTSCH: I rest on the presentation of the evidence up to this point.

MR. KIMBALL: The Respondent rests and renews the motions which it had made before the first witness was called for all the same reasons as explained even more clear by the testimony of the Government's witness.

JUDGE CHODES: I will reserve decision. So Mr. Kimball, do you wish to make a closing statement?

MR. KIMBALL: I don't think it is necessary. I am sure you have our points in

mind.

MR. GOTSCH: I would like to respond to the Respondent's last motion. It appears that the issue the Respondent is raising has to do with the reasonable promptness question involving Section 9 of the Act, and again, I would like to point out that this is a matter that has to be pleaded and approved by the Respondent as an affirmative defense, and I don't believe that he has covered this item, and I believe that particular defense should be stricken as no proof has been presented with respect to it.

I would move to strike that defense particularly in light of the fact that witnesses are here that could go into it.

JUDGE CHODES: I will reserve decision on that. Each of you will have the responsibility of submitting a brief, if you wish and conclusions of law you will have 20 days from the time you are informed that the transcript is available to submit a brief.

Anything further?

MR. GOTSCH: No.

MR. KIMEALL: No.

JUDGE CHODES: The Hearing is closed.

The Hearing closed at 2:30 P.M., this
date.

* * *

I hereby certify that the foregoing is a
true and accurate transcript of the minutes
taken at this hearing.

Harold Swiss

I N D E XPAGE

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U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

OSHA-2C

CSHO NO.	OSHA-1 NO.
Q7748	93
AREA	REGION
4170	II

TO: Capt. Russell, Varsity, Inc.
Northeast Marine Terminal Co. Inc. Date February 4, 1972
17 Battery Place
New York, New York 10004

Subject: Citation for Alleged Occupational Safety and Health Violation(s)

An inspection of a workplace under your operation, ownership, or control has revealed conditions which we believe do not comply with the provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651. The nature of such alleged violation(s) is described in the enclosed citation with references to applicable standards, rules, regulations, and provisions of the said Act. These conditions must be corrected on or before the date shown to the right of each violation therein.

The Act requires that a copy of the enclosed citation(s) be prominently posted "in a conspicuous place upon receipt" at or near each place a violation referred to in the citation occurred. It must remain posted until all violations cited therein are corrected, or for 15 working days, whichever period is longer. A sufficient number of copies of the attached citation(s) should be prepared to permit posting in accordance with the requirements of the Act.

If you contest the citation you may post a notice to this effect near the citation contested. The Act contains penalties for violation of the posting requirements.

You will soon be notified by certified mail whether or not a proposed penalty will be assessed as a result of the cited violation(s). You have the right to contest the citation(s), the proposed penalties, or both, before the Occupational Safety and Health Review Commission. The Review Commission is an independent quasi-judicial agency with authority to issue decisions regarding citations and proposed penalties. If you do contest, you must so notify the Area Director within 15 working days after receipt of the certified mail notice regarding proposed penalties. If you fail to contest within the 15 working day period, the citation and the proposed assessment of penalties shall be deemed to be a final order not subject to review by any court or agency.

An employee or representative of employees may file a notice to contest the time stated in the citation for the abatement of the alleged violation(s).

Alleged violations that are not contested shall be corrected within the abatement period specified in the citation. Failure to correct an alleged violation within the abatement period may result in a further proposed assessment of penalties.

As to alleged violations with an abatement period of 30 days or less, you are directed to promptly advise the Area Director as to the specific corrective action on each such violation and the date of such action.

Alleged violations having a longer abatement period will require a progress report at the end of each 30-day period. The progress report should detail what has been done, what remains to be done, and the time needed to fully abate each such violation. When the alleged violation is fully abated, the Area Director shall be so advised.

A followup inspection may be made for the purpose of ascertaining that you have posted the citations as required by the Act and corrected the alleged violations as you have reported. The Act provides that whoever knowingly gives false information is subject to a fine up to \$10,000, imprisonment up to 6 months, or both.

If you wish additional information, you may direct such request to the undersigned at the address listed above.

U. S. Department of Labor

By Area Director

\$170
2/15/72
PAID
me

BEST COPY AVAILABLE

U.S. DEPARTMENT OF LABOR
Occupational Safety and Health Administration

CSHO NO.	OSHA-1 NO.
Q7748	93
AREA	REGION
4170	II

CITATION*

Citation Number 1- Page 3 of 4 Date Issued January 25, 1972
EMPLOYER Northwest Marine Terminal Co. Inc.
(Street) 17 Battery Place
ADDRESS (City) New York State New York Zip 10004

An inspection of a workplace under your ownership, operation, or control located at 39th Street Terminal, Brooklyn, N.Y. and described as follows Stowdoring

has been conducted. On the basis of the inspection it is alleged that you have violated the Occupational Safety and Health Act of 1970, 29 U.S.C. 651, in the following respects: January 25, 1972

Item number	Standard or regulation allegedly violated	Description of alleged violation	Date on which alleged violation must be corrected
4. (cont'd)	-	least one U.S. Coast Guard approved 30 inch lifeline with not less than 90 feet of line attached and portable ladder. (4) vessels working as follows:- ① M/V "Ocean Proctor" ② M/V "Pacific Ocean" ③ M/V "San Francisco Maru" ④ Lighter - PRR # 317	-
5. Part 1910.178(n)(3)		For failure to prohibit unauthorized personnel from riding in powered industrial trucks next to driver. (2) instances (In Terminal area)	Abated immediately

Area Director's Signature _____

The issuance of a citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for in the Act or, if contested, unless the citation is affirmed by the Occupational Safety and Health Review Commission.

RIGHTS OF EMPLOYEES

Any employee or representative of employees who believes that any period of time fixed in this citation for the correction of a violation is unreasonable has the right to contest such time for correction by filing a notice with the U.S. Department of Labor at the address shown above within 15 working days of the receipt by the employer of notice of proposed penalty or notice that no penalty is being proposed.

"No person shall discharge or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in such proceeding or because of the exercise by such employee on behalf of himself or others of any right afforded by this Act." Sec. 11 (c)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 651.

The law requires that a copy of the enclosed citation(s) "shall be prominently posted" in a conspicuous place "at or near each place a violation referred to in the citation occurred." It must remain posted until all violations cited therein are corrected, or for 3 working days, whichever period is longer.

* Alleged violations covered by this citation are those which are not serious violations within the meaning of the Act but which have a direct or immediate relationship to occupational safety and health.

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

NORTHEAST MARINE TERMINAL COMPANY,
INC.

Respondent.

DECISION AND ORDER

OSAHRC DOCKET

NO. 8221

APPEARANCES:

Theodore T. Gotsch, Esq., of New York, N. Y., for the
Secretary of Labor

William M. Kimball, Esq., of New York, N. Y., for the
Respondent

Joseph Chodes, Judge, OSAHRC

STATEMENT OF THE CASE

This is a proceeding pursuant to section 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. §651 et seq.) in which the respondent is contesting a citation issued by the complainant under the authority vested in complainant by sections 9(a) of the Act (29 U.S.C. §658(a)). After a complaint and an answer had been filed by the parties,

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the case came on for hearing at New York, New York on September 13, 1974.

The citation, which was issued on May 14, 1974, following an inspection on April 3 and 4, 1974 of a place of employment at the Marine Terminal at the foot of 39th Street, Brooklyn, New York, alleged that the respondent violated section 5(a)(2) of the Act (29 U.S.C. § 654(a)(2)) by failing to comply with certain occupational safety and health standards promulgated by the Secretary of Labor pursuant to section 6 of the Act (29 U.S.C. § 655) and codified in 29 Code of Federal Regulations, Chapter XVII, Parts 1910 and 1918.

Specifically, the respondent was charged with a repeated violation and with nonserious violations as follows:

Repeated Violation

29 C.F.R. § 1910.178(m)(3) in that respondent failed to prevent unauthorized personnel from riding on powered industrial trucks.

Nonserious Violations

1. 29 C.F.R. § 1910.27(f) in that respondent failed to maintain all ladders in a safe condition and inspect all ladders regularly with the intervals between inspections being determined by use and exposure.

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2. 29 C.F.R. § 1910.22(a)(1) in that respondent failed to keep all places of employment clean and orderly and in a sanitary condition.

3. 29 C.F.R. § 1910.213(h)(1) in that respondent failed to equip a radial arm saw with a lower blade guard in building 111A storeroom.

4. 29 C.F.R. § 1918.25(e) in that respondent permitted the use of a portable straight ladder which failed to extend at least 36 inches above the upper landing surface in the garage from a platform to the 10 foot blockhouse.

5. 29 C.F.R. § 1918.25(f) in that respondent failed to lash, block or otherwise secure a portable straight ladder in the garage used from a platform to the 10 foot blockhouse to prevent shifting or slipping.

6. 29 C.F.R. § 1910.106(e)(2)(iv)(b) in that flammable or combustible liquids were used or handled in the garage machine repair area without providing means to dispose promptly and safely of leakage or spills.

Pursuant to the enforcement procedure set forth in section 10(a) of the Act (29 U.S.C. § 659(a)), the respondent was notified by letter dated May 14, 1974, from Nicholas A. DiArchangel, Area Director of the New York area, Occupational Safety and Health Administration, U. S. Department of Labor, of the assessment of proposed penalties for the violations totalling \$620.

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PRELIMINARY MOTIONS

The respondent moved to vacate the citations and proposed penalties on the grounds that the citation was not issued "with reasonable promptness" as required by section 9(a) of the Act (29 U.S.C. § 658(a)). The authority relied on was Secretary v. Chicago Bridge & Iron Co., 6 OSAHRC 244(1974). That case held that the issue of reasonable promptness was an affirmative defense. In the absence of evidence that the citation was issued more than three days after the complainant or his authorized agent had formed his belief that a violation had occurred (the rule followed in the Chicago Bridge case) the motion was denied (T-8).

Another motion to vacate the citation and proposed penalties was made by respondent. It was contended that the citations in the instant case should be vacated because a citation was issued to another employer for alleged violations at the same worksite involved herein about a month prior to the issuance of the citations in the instant case. The motion was denied since any action taken by complainant against another employer is not considered to be relevant to the disposition of this case (T-12).

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AMENDMENT OF CITATION

At the hearing a motion to amend item 4 of the citation for nonserious violations to read "29 C.F.R. 1918.25(e)" was granted (T-91).

SUMMARY OF EVIDENCE AND DISCUSSION

On April 3 and 4, 1974, Joseph D. Martino, one of the claimant's compliance officers, inspected Marine Terminal at the foot of 29th Street, Brooklyn, New York, comprising several piers consolidated into one complex (T-14, 15). He met with Mr. Kiplock, safety director for the Northeast Stevedoring Co. (a different company from Northeast Marine Terminal Co., the respondent herein) and Mr. Viola, vice president of Northeast Stevedoring Co. (T-15, 16, 19). Mr. Martino was accompanied on his inspection by Mr. Kiplock, and Mr. Ciccone and Mr. Santos, shop stewards for Local 1814, I.L.A. (T-23, 24). Initially, Mr. Martino did not know that another company, the respondent Northeast Marine Terminal Co., Inc. was also working at the terminal.

At the conclusion of the inspection, Mr. Martino held a closing conference with Mr. Kiplock during which they discussed about 27 alleged violations observed during the inspection. Mr. Kiplock stated that there were too many violations to "lay off" on Northeast Stevedoring Co. and suggested that,

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since Northeast Stevedoring Co. performed one function at worksite (loading and discharging vessels, storing and removing cargo from sheds, and loading and discharging trucks) while the respondent Northeast Marine Terminal Co. performed other functions (repairs, maintenance and care of fire equipment), the violations should be divided between the two companies. Mr. Martino and Mr. Kiplock went down the list of violations and agreed to charge the respondent with the violations relating to the operational features at the terminal and to charge Northeast Stevedoring Co. with the other violations (T-26, 27). The determination with respect to which violations would be charged against each employer was made by mutual agreement between Mr. Martino and Mr. Kiplock acting as representatives of management for both employers (T-67, 83, 85).

Following Mr. Martino's inspection, a citation was issued against Northeast Stevedoring Co. on April 15, 1974 for 14 or 15 violations (T-85) and later, on May 14, 1974, citations were issued against the respondent which are the subject of this proceeding.

Mr. Martino, who was the only witness at the hearing, testified to facts from which violations of the standards charged against the respondent could be inferred. However, there is no probative evidence in the record showing that

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the violations established exposed employees of the respondent, Northeast Marine Terminal Co., to the hazards contemplated by the standards.

There is evidence that Mr. Magna, who is vice-president of Northeast Marine Terminal Co., the respondent herein, abated a violation involving an unauthorized rider on a powered industrial truck, but the identity of the employer of the employees involved was not elicited (T-49, 50). The compliance officer was not sure who hired the employees (T-52). Mr. Magna also ordered abatement involving a ladder violation, but here again, there is no definite evidence indicating for whom the involved employees worked (T-92, 93). While the compliance officer obtained the names of some of the employers involved, he did not ask or otherwise determine for whom they were working (T-31, 75). The failure of the compliance officer to obtain information concerning the employment status of the individuals affected by the violations is understandable in light of his initial unawareness that more than one employer was involved at the worksite. Unfortunately, this does not cure the deficiency in the evidence.

Violations of the Act cannot be predicted on an arrangement between a compliance officer of the complainant and the safety director of an employer who is not the respondent in this case, albeit he did have some overall supervision of the worksite.

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This is particularly so where the determining factor as to which employer to cite was the nature of the work employees were performing at the time the violation was observed, rather than the identify of the employer whose employees were exposed to the hazard.

Absent proof that the violations found exposed employees of this respondent to the hazards contemplated by the standards violated, a citation against the respondent cannot be sustained. The principle was expressed by Chairman Moran in Secretary v. Otis Elevator Co. No. 688 (October 8, 1974) as follows:

This Commission has consistently held that just because a condition on the work-site fails to comply with the specifications of a standard, a violation of the Act has not been established. There must be evidence that employees of respondent have been exposed to the hazard as a result of non-compliance. Secretary v. Hawkins Construction Co., OSAHRC Docket No. 949 (May 20, 1974); Secretary v. City Wide Tuckpointing Service, OSAHRC Docket No. 247 (May 24, 1973).

FINDINGS OF FACT

On the basis of the citations, notification of proposed penalty, notice of contest, pleadings and the representations of the parties, it is concluded that on the basis of the

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record as a whole, a preponderance of the evidence supports the following findings of fact:

1. The respondent is an employer engaged in a business affecting commerce (respondent's answer, paragraph 2).

2. On May 14, 1974, the complainant issued citations for a repeat violation and for nonserious violations as set forth above under the heading "Statement of the Case" and at the same time the respondent was notified of the proposed penalties totalling \$620.

3. On May 28, 1974 the respondent filed with the complainant a notice of contest of the citations and proposed penalty referred to in paragraph 2 above.

4. An inspection of a workplace at the Marine Terminal at the foot of 29th Street, Brooklyn, New York, made on April 3 and 4, 1974, revealed that the standards set forth above under the heading "Statement of the Case" had been violated, but the evidence does not establish that any of the respondent's employees were affected by the violations or exposed to the hazards contemplated by the standards.

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CONCLUSIONS OF LAW

1. The respondent at all times material hereto was engaged in business affecting commerce within the meaning of section 3(5) of the Occupational Safety and Health Act of 1970.

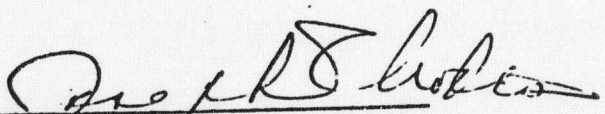
2. The respondent at all times material hereto was subject to the requirements of the Occupational Safety and Health Act and the standards promulgated thereunder, and the Commission has jurisdiction of the parties and of the subject matter herein.

3. The respondent did not violate the standards set forth above under the heading "Statement of the Case".

ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, it is

ORDERED that the citations issued on May 14, 1974 for violation of 29 C.F.R. sections 1910.178(m)(3); 1910.27(f); 1910.22(a)(1); 1910.213(h)(1); 1918.25(e); 1918.25(f); and 1910.106(e)(2)(iv)(b) and the proposed penalties totalling \$620 are hereby vacated.


JOSEPH CHODES
JUDGE, OSAHRC

Dated: January 30, 1975
New York, New York



UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

1825 K STREET, NW
WASHINGTON, D C 20006

August 31, 1976

IN REFERENCE TO SECRETARY OF LABOR v.

Northeast Marine Terminal Company, Inc.

OSAHRC
DOCKET NO. 8221

NOTICE IS HEREBY GIVEN TO THOSE LISTED BELOW:

FOR THE SECRETARY OF LABOR

Francis V. LaRuffa,
Regional Solicitor
U. S. Department of Labor
1515 Broadway Room 3555
New York, New York 10036

OF COMMISSION DECISION

To wit: See Attached

FOR EMPLOYER

William M. Kimball, Esquire
Burlingham, Underwood & Lord
25 Broadway
New York, New York 10004

FOR EMPLOYEES

Joseph Chodes, Judge
Occupational Safety & Health
Review Commission
6525 Belcrest Road -Suite 1005
Hyattsville, Md. 20782

FOR THE COMMISSION

William S. McLaughlin

WILLIAM S. McLAUGHLIN
EXECUTIVE SECRETARY

UNITED STATES OF AMERICA
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

SECRETARY OF LABOR,

Complainant,

v.

NORTHEAST MARINE TERMINAL COMPANY,

Respondent.

OSAHRC DOCKET NO. 8221

DECISION

Before: BARNAKO, Chairman; MORAN and CLEARY, Commissioners.

MORAN, Commissioner: A decision of Review Commission Judge Joseph Chodes, dated January 30, 1975, is before this Commission for review pursuant to 29 U.S.C. § 661(i). That decision vacated two citations alleging that respondent failed to comply with the requirements of seven different occupational safety standards. Review was directed on the following issues:

- (1) What effect if any should be given in this case to Brennan v. Gilles & Cotting, Inc. and OSAHRC, 504 F.2d 1224 (4th Cir. 1974), and Brennan v. OSAHRC and Underhill Construction Corp., 513 F.2d 1032 (2d Cir. 1975)? 1/

1/ This issue concerns the liability of employers on multi-employer worksites. In Secretary v. Anning-Johnson Co., OSAHRC Docket No. 3694, May 12, 1976, and Secretary v. Grossman Steel & Aluminum Corp., OSAHRC Docket No. 12775, May 12, 1976, a divided Commission held that an employer on a multi-employer construction site who creates or controls a hazard to which employees of any employer are exposed is liable. The Commission further held that an employer who did not create or control a hazard but whose employees were exposed thereto was also liable under certain circumstances. A divided Commission has also held that exposure is to be determined by a rule of access. Secretary v. Gilles & Cotting Inc., OSAHRC Docket No. 504, Feb. 20, 1976.

In this case, we find a failure of proof both as to whether respondent created or controlled the hazardous conditions shown to exist and whether respondent's own employees were exposed to the hazards. Therefore, respondent is not responsible under any theory of liability and further discussion of this matter is obviated. Consequently, the divergent positions Chairman Barnako and I both took in the above decisions in no way are inconsistent with our agreement in this opinion.

- (2) Whether the Administrative Law Judge erred in finding that respondent's employees were not shown to have been exposed to the hazards contemplated by the standards at 29 C.F.R. § 1910.178(m)(3), 29 C.F.R. § 1910.22(a)(1), and 29 C.F.R. § 1910.106(e)(2)(iv)(b)?

For the reasons that follow, we affirm the Judge's decision which is attached hereto as Appendix A. ^{2/}

Complainant's inspector was the only witness at the hearing. He testified that he conducted the inspection of respondent's worksite, a marine terminal, under the assumption that the entire worksite was under the control of the Northeast Marine Stevedoring Company and occupied solely by its employees. In actuality, the worksite was also occupied by respondent, a company which is corporately separate from Northeast Marine Stevedoring Company and which hires its own employees. Because of this erroneous assumption, the inspector, upon observing noncompliant conditions, failed to inquire as to which company was responsible for the conditions and which company employed the workers who were exposed to the hazards caused by those conditions. The only significant testimony he was able to give regarding his observations of the three alleged violations enumerated in the second directed issue ^{3/} is as follows:

^{4/} 29 C.F.R. § 1910.178(m)(3). A high-low truck was coming out of a shed on which two men were riding. The truck was equipped with only one seat. One of the riders was a Mr. Lennon, the "foreman of the pier."

^{2/} Chairman Barnako does not agree to this attachment.
^{3/} The complainant argues in his review brief that only these three violations are in issue and requests reversal of the Judge's decision only as to those violations.

^{4/} This standard provides that:

"Unauthorized personnel shall not be permitted to ride on powered industrial trucks. A safe place to ride shall be provided where riding of trucks is authorized."

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5/
29 C.F.R. § 1910.22(a)(1). Debris was scattered in a storeroom and in the garage. In the maintenance area of the garage, parts and machines blocked access route for employees in the area.

6/
29 C.F.R. § 1910.106(e)(2)(iv)(b). In the garage area, various machine parts were dripping gasoline. Employees were working in the area which was blocked off for security reasons.

Subsequent to the inspector's notation of these violative conditions, he discovered that respondent was also an employer on the site. Upon this discovery, he and a Mr. Kiplock, who had identified himself previously as the safety director for Northeast Marine Stevedoring Company, attempted to rectify the error by apportioning the violations between the two companies. The inspector testified as follows regarding Mr. Kiplock's views on the equitable allocation of the violations:

"[D]uring the discussion, Mr. Chiplock [sic] suggested there were too many [violations] to lay off on the Stevedore and they should be separated between the Stevedore and the Terminal operation because the Stevedore did one function and the Terminal did another function. Where the terminal made repairs and provided proper roadway and fire equipment and whatever was necessary to maintain a good place to work and the building and shed and equipment, whereas the Stevedore's primary function was to load and discharge vessels and store the cargo and remove it from the sheds and load and discharge trucks."

5/ This standard provides that:

"All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly and in a sanitary condition."

6/ This standard provides that:

"Where flammable or combustible liquids are used or handled, except in closed containers, means shall be provided to dispose promptly and safely of leakage or spills."

The Judge determined that the evidence was insufficient to prove that employees of respondent were exposed to the hazardous conditions. He concluded:

"[T]here is no probative evidence in the record showing that the violations established exposed employees of the respondent, Northeast Marine Terminal Co., to the hazards contemplated by the standards While the compliance officer obtained the names of some of the employers involved, he did not ask or otherwise determine for whom they were working The failure of the compliance officer to obtain information concerning the employment status of the individuals affected by the violations is understandable in light of his initial unawareness that more than one employer was involved at the worksite. Unfortunately, this does not cure the deficiency in the evidence.

Violations of the Act cannot be predicated on an arrangement between a compliance officer of the complainant and the safety director of an employer who is not the respondent in this case, albeit he did have some overall supervision of the worksite."

We find that complainant has failed to establish by a preponderance ^{7/} of the evidence that any employee of respondent was actually exposed to the alleged hazardous conditions or had access thereto. In view of that failure, we agree with the Judge's disposition of the exposure question.

Moreover, we cannot infer from the evidence that respondent created the noncompliant conditions or was responsible therefor. The inspector's only information regarding respondent's responsibilities was from Mr. Kiplock. That evidence is much too inconclusive and unreliable for us to conclude that respondent was the responsible employer. Mr. Kiplock simply outlined to the inspector the general functions of respondent and the general working areas of respondent's employees. There was no direct

7/ See Olin Construction Co. v. OSAHRC, 525 F.2d 464 (2d Cir. 1975); Secretary v. Armor Elevator Co., 5 OSAHRC 260 (1973).

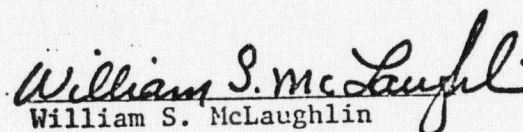
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evidence from which we can reasonably infer that respondent was the employer responsible for the alleged hazards involved in this case or who created them. The hearsay statements of Mr. Kiplock on the professed functions of respondent are inherently unreliable because his authority to represent respondent was not clearly shown. On the other hand, the Judge's distrust of Mr. Kiplock's allocation of the violations was justifiable since his authority to represent the Northeast Stevedoring Company has not been questioned.

Finally, we note our basic disapproval of the procedures followed by the inspector in this case. He should not have attempted to correct his mistake by simply dividing up the violations, especially since he was dependent solely on the judgment of Mr. Kiplock to do so. It would have been more equitable, and simpler in the long run, for him to have retraced his steps and determined for himself who was actually responsible for the conditions and whose employees were exposed to the resulting hazards.

Because of the aforementioned evidentiary deficiencies in complainant's case on the responsibility and exposure questions, the Judge's decision holding that the citations must be vacated is affirmed.

FOR THE COMMISSION


William S. McLaughlin
Executive Secretary

DATED: AUG 31 1976

CLEARY, Commissioner, DISSENTING:

The Secretary of Labor has successfully carried his burden of establishing respondent's violation of section 5(a)(2) of the Act 8/ for its failure to comply with the standards at 29 CFR §1910.178(m)(3), 29 CFR §1910.22(a)(i), and 29 CFR §1910.106(e)(2)(iv)(b). 9/ Hence, I do not agree with my colleagues' disposition of this case.

Our point of disagreement does not center on whether the standards cited by the Secretary apply to the conditions at issue, nor, I believe, do we disagree that there has been a failure to comply with the cited standards. Indeed, Judge Chodes found that violations of the Act did exist. Furthermore, I doubt seriously, based upon the record before us, that my colleagues would argue that no employees were exposed to the hazards occasioned by the admittedly present violative conditions. In short, I submit that the majority (a) knows the cited standards apply to the conditions at issue, (b) knows there has been a failure to comply with the cited standards, and (c) knows there are employees exposed to the hazards created by these noncomplying conditions. Yet, by all but ignoring essential facts, my colleagues manage to vacate the citations.

The majority concludes that it cannot infer from the evidence that respondent created the noncomplying conditions or was responsible therefor. The only way my colleagues can reach this conclusion is to

8/ 29 U.S.C. §654(a)(2).

9/ The standards have been set out in the majority opinion.

discount completely the statements made to the Secretary's compliance officer (CO) by respondent's safety director, Mr. Kiplock. 10/

At the conclusion of the two day inspection, respondent's safety director told the CO 11/ that Northeast Marine Terminal was responsible for providing and maintaining the roadway, work sheds, buildings, and equipment in the terminal. On the other hand, the safety director continued, Northeast Marine Stevedoring was responsible for loading and discharging vessels, storing and removing cargo from sheds, as well as loading and discharging trucks. 12/

10/ The majority states that Mr. Kiplock's "authority to represent respondent was not clearly shown." I disagree. There is un rebutted testimony establishing that Mr. Kiplock was the safety director for both North-east Marine Stevedoring Company and Northeast Marine Terminal Company (respondent). In addition, he was named as such in a letter from respondent's counsel to Judge Chodes. The letter, in pertinent part, reads as follows:

Respondent may call as a witness its safety director, P. Kiplock, who is an expert on terminal activities and who may testify concerning specific facts of each claimed violation . . . (emphasis added).

- 11/ The testimony of the compliance officer with respect to the safety director's statements is arguably hearsay. These statements, however, were admissions of a party-opponent by an employee concerning a matter within the scope of his employment. See McCormick, Handbook of the Law of Evidence, Sec. 267 (2d ed. 1972). As such, the statements are reliable and probative. See 5 U.S.C. §556(d). Furthermore, the Federal Rules of Evidence characterize such admissions as non-hearsay, F.R.Ev. 801 (d)(2), and freely admissible to prove the truth of the matter asserted.
- 12/ This breakdown of assigned responsibilities comports with the commonly recognized stevedore functions. Indeed, "stevedore" as a term is defined as "to work at or undertake responsibility for the loading and unloading of a ship." Webster's Third New International Dictionary (unabridged, 1971).

In addition to these general descriptions, respondent's safety director assisted the CO in determining the responsibility under the Act for each noncomplying condition. Regarding both the powered industrial truck item [29 CFR §1910.178(m)(3)] and the housekeeping item [29 CFR §1910.22(a)(1)], the safety director noted that Northeast Marine Terminal (respondent) was the proper party to cite since no ships were "working" at the time. In other words, there was no loading or unloading being done - the function performed by Northeast Marine Stevedoring. As to the flammable liquid item, respondent's representative made it known that the gasoline was being used by Northeast Marine Terminal to clean equipment as part of its repair and maintenance function.

Even if respondent's representative had never said a word to the CO, the safety director's actions concerning the cited items illustrate respondent's control of the hazardous conditions. ^{13/} Upon discovering the powered industrial truck and housekeeping violative conditions, Mr. Kiplock, respondent's safety director, ordered and obtained immediate abatement.

As noted previously, the third violative condition, that involving the flammable liquid, concerned the cleaning and maintenance of certain equipment by Northeast Marine Terminal for eventual use by Northeast

^{13/} In determining if one has control of a hazardous condition, the Commission considers whether the employer "realistically had the means to rectify the condition in the manner contemplated by the cited standard" (footnotes omitted). Anning-Johnson Company, Nos. 3694 & 4409, BNA 4 OSHC 1193, CCH OSHD para. 20,690 (1976). The "means to rectify" refers not only to actual physical capability, but includes also the ability to order abatement. See Anning-Johnson Company, supra.

Marine Stevedoring. It is clear to me that respondent controlled, if it did not create, the physical conditions that resulted in the citations. Hence, we have an employer who controls hazards to which the employees of another employer engaged in work at the same site are exposed. Under such circumstances, I would extend the multiple employer precedent developed by the Second Circuit in Brennan v. O.S.H.R.C. and Underhill Construction Corp., 513 F.2d 1032 (2d Cir. 1975)^{14/} and would find Northeast Marine Terminal Co. in violation of the Act for its failure to comply with the standards at 29 CFR §1910.178(m)(3), 29 CFR §1910.22(a)(1), and 29 CFR §1910.106(e)(2)(iv)(b).

^{14/} The Commission has stated previously that it will follow the Second Circuit's Underhill decision. Anning-Johnson Co., Nos. 3694 & 4409, BNA 4 OSHC 1193, CCH OSHD para. 20,690 (1976); Grossman Sheet & Aluminum Corp., No. 12775, BNA 4 OSHC 1185, CCH OSHD para. 20,691 (1976).